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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit denying enforcement of the Board's order.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 21-63) is not yet officially reported. The decision and order of the Board in the unfair labor practice proceeding (App. C, *infra*, pp. 68-80) are reported

at 172 NLRB No. 77. The Board's earlier decision and determination of dispute (App. D, *infra*, pp. 81-94) are reported at 167 NLRB 185.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 64-65) was entered on June 30, 1970. The Board's timely petition for rehearing *en banc* was denied on October 1, 1970 (App. B, *infra*, pp. 66-67). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board has power to determine a jurisdictional dispute under Section 10(k) of the National Labor Relations Act where the competing unions have agreed upon a voluntary method of adjustment, but the employer involved has not consented to be bound by that procedure.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> 4(i) to engage in, or to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of

his employment to * * * work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * *

Sec. 10. * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

STATEMENT

A. The Underlying Disputes

This case involves picketing by the Plasterers Union ("Plasterers")[1] directed against two different employers—Texas State Tile & Terrazo Company ("Texas State") and Martini Tile and Terrazo Company ("Martini")—in furtherance of its demand that the work of applying a coat of Portland cement mortar to walls upon which tile was to be installed should be assigned to employees represented by Plasterers rather than to employees represented by the Tile Setters Union ("Tile Setters").[2]

1. *The Anderson library job*

In 1965, Southwestern Construction Company ("Southwestern"), a general contractor, entered into a contract with the University of Houston to construct an addition to the University's library. The tile and terrazzo work was subcontracted to Texas State, which commenced work in August 1966. (App. D, pp. 83-84; A. 29-30, 38.)[3] Texas State assigned the tile work to employees represented by Tile Setters, the union with which it had a collective bargaining agreement (App. D, p. 84; A. 42, 47, 61). This work, which

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[1] Plasterers' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO.

[2] Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO.

[3] "A." refers to the portion of the record printed as an appendix to the briefs in the court below.

occurred after employees represented by Plasterers had applied a thin scratch coat of cement over the metal lath, consisted of applying a second coat of Portland cement mortar and then tile to the stairwells and the walls of the restrooms of the eight story library building. (App. D, p. 85; A. 31-32, 38-39, 49-50, 150-151.)

During the fall of 1966, Plasterers advised Tile Setters that the application of the second coat was the work of Plasterers (App. D, p. 84; A. 49, 51-52, 54).[4] Tile Setters rejected this claim, and Plasterers submitted the matter to the National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"), a tribunal established by the Building Trades Department, AFL-CIO (App. D, p. 84; A. 54-55). Both unions are bound by decisions of the Joint Board by virtue of their affiliation with constituent International Unions of the Building Trades Department; however, neither Texas State, the employer who assigned the disputed work, nor the local or national contractors' associations to which it belonged, had agreed to be bound by the procedures of the Joint Board (App. C, p. 74; App. D, pp. 84, 88).

The competing unions presented their respective positions to the Joint Board, but Texas State informed the Joint Board that it did not wish to submit the dispute to it (A. 406-410). On November 10, 1966, the Joint Board awarded the disputed work—which it characterized as "the plumbing, rodding, and squaring of walls which are to receive tile"—to Plasterers.

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[4] The disputed coat is called the "float coat" or "setting bed" by Tile Setters, and the "brown coat" by Plasterers (App. D, p. 85; A. 51-52).

Thereafter, Plasterers made several attempts to obtain the work, but Texas State refused to accede to its demands, and assigned the work to Tile Setters (App. C, p. 72; App. D, p. 84; A. 55-56, 415).

On January 24, 1967, Plasterers commenced picketing at the jobsite to force Texas State to assign the disputed work to employees whom it represented (App. C, pp. 72-73; A. 44, 45). All crafts working on the job honored the picket line, causing a complete work stoppage (App. C, p. 72; A. 33, 34, 47). The picketing ceased after the United States District Court for the Southern District of Texas, upon application of the Board's Regional Director, issued an injunction pursuant to Section 10(l) of the Act (29 U.S.C. 160(l)) (App. C, p. 72; A. 28-29).

2. *The Rainbo Bakery job*

Martini entered into a direct contract with Rainbo Baking Company to remodel a panning room at Rainbo's bakery in Houston, Texas (App. D, p. 85; A. 57, 99, 109). Martini began work on March 15, 1967 (App. D, p. 85). It assigned the work, which involved the direct application of a coat of Portland cement mortar to metal lath laid over painted brick, to Tile Setters, with whom Martini had a collective bargaining agreement (App. D, pp. 85, 86; A. 57, 58-59, 99, 109-110). On March 17, 1967, Plasterers picketed the jobsite in order to force Martini to assign the disputed work to employees whom it represented (App. C, p. 73; App. D, p. 88; A. 57, 439). At Rainbo's request, Martini removed its employees from the job and the picketing ceased (App. D, p. 85; A. 59-60,

98-99). Thereafter, Martini returned and completed the job without further incident (App. D, p. 85; A. 57-58). Plasterers did not submit the dispute to the Joint Board (App. D, p. 86). Neither Martini nor any of the associations to which it belonged were bound by the procedures of the Joint Board (App. D, p. 88; A. 57, 128).

B. The Proceedings Before the National Labor Relations Board

1. *The Section 10(k) proceeding*

Meanwhile, Southwestern and Martini filed unfair labor practice charges with the National Labor Relations Board, alleging that Plasterers' picketing and related conduct violated Section 8(b)(4)(D) of the Act (App. C, *infra*, pp. 68-69). The Board's Regional Director found reasonable cause to believe that the charges had merit and, pursuant to Section 10(k) of the Act, issued a notice of hearing to determine the dispute out of which the alleged violation arose. In April 1967 a hearing was held before a hearing officer of the Board, at which the competing unions and the employers involved—Southwestern, Texas State, and Martini—presented evidence and argument in support of their respective positions (App. D, pp. 81-82).

On August 22, 1967, the Board issued its decision and determination of dispute. After weighing all the relevant factors presented, including the action of the Joint Board, it concluded with respect to both projects that employees represented by Tile Setters, rather than those represented by Plasterers, were entitled to

perform the work of applying to walls a coat of Portland cement mortar upon which tile was to be installed. (App. D, pp. 92-94).[5] The Board rejected Plasterers' contention that the notice of hearing should be quashed because the disputing unions had agreed upon a method for voluntary settlement, applying its long standing principle that the Board is obligated to determine the dispute under Section 10 (k) unless all parties to the dispute, including the employers assigning the work, have assented to the voluntary method (App. D, p. 88, n. 3). The Board directed Plasterers to notify the Regional Director within 10 days whether it would comply with the Board's determination of the disputes (App. D, p. 94).

2. *The unfair labor practice proceeding*

When Plasterers refused to comply with the Board's determination of the work disputes, the General Counsel of the Board issued a complaint upon the 8(b)(4)(D) unfair labor practice charges (*supra*, p. 7), which had been held in abeyance in the hope that the 10(k) determination would obviate the need for deciding those issues (App. C, p. 70; A. 440; 29 C.F.R. 102.90, 102.91). The parties waived a hearing before a Trial Examiner and agreed to submit the mat-

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[5] The Board considered the collective bargaining agreements among the parties; employer, area, and industry practice; relative skills and efficiency of operation; agreements between Plasterers and Tile Setters; and, as noted above, the Joint Board award. The Board declined to accord controlling weight to that award "[i]n view of all the circumstances, including its ambiguous nature" (App. D, pp. 89-93).

ter directly to the Board. The parties further agreed to make the record in the Section 10(k) proceeding a part of the unfair labor practice proceeding. (App. C, pp. 69-70; A. 442-443).

Upon the entire record, the Board concluded that Plasterers had violated Section 8(b)(4)(D) of the Act by picketing the Anderson and Rainbo jobs in order to force Texas State and Martini to assign the disputed work to employees represented by Plasterers rather than employees represented by Tile Setters (App. C, pp. 75, 76). The Board ordered Plasterers to cease and desist from such activity, to post appropriate notices and to notify the Regional Director what steps had been taken to comply with the order (App. C, pp. 77-78). The Board again rejected Plasterers' contention that the Board was precluded from hearing and determining the dispute under Section 10(k) because the competing unions had agreed upon a voluntary method of adjustment (App. C, pp. 74-75).

C. The Decision of the Court of Appeals

The court of appeals (Judges Leventhal and McGowan, with Judge MacKinnon dissenting) denied enforcement of the Board's order (App. A, pp. 21-63). The court recognized that Section 10(k) commands the Board to abstain from hearing and determining a work dispute when "the parties to such dispute" have either adjusted the dispute or agreed upon a method for adjustment. It concluded, however, that "[i]t is not the employer but the rival unions (or other employee groups) who are parties to the juris-

dictional dispute contesting which employees are entitled to seek the work in question" (App. A, p. 33). Accordingly, the court held that "the Board may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions have agreed to settle their dispute through binding arbitration" (App. A, p. 24).[6]

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals—that the Board is deprived of power to hear and determine a jurisdictional dispute under Section 10(k) when the competing unions, but not the employer who has made the disputed work assignment, have agreed upon a voluntary method for the resolution of the dispute—is contrary to the interpretation which the Board consistently has given Section 10(k) since its enactment over 23 years ago and which the courts of appeals heretofore have approved. The issue is of manifest importance in the administration of the Act, and the decision below, if allowed to stand, is bound to have an unsettling effect on labor relations in important segments of the economy, and particularly in the construction industry.

1.a. Section 8(b)(4)(D) of the Act makes it an unfair labor practice for a labor organization to exert strike pressure for the purpose of forcing "any em-

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[6] Although the Rainbo Bakery dispute was not submitted to the Joint Board, the court of appeals nevertheless held that, because the two unions had agreed to be bound by the procedures of the Joint Board, the National Labor Relations Board was precluded from hearing and determining the dispute under 10(k).

ployer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class * * *." If such a charge is filed and deemed substantial, the Act, instead of providing for the immediate institution of an unfair labor practice proceeding, as it does for other unfair labor practice charges (Section 10(b), 29 U.S.C. 160(b)), suspends further action on the 8(b)(4)(D) charge pending an effort to resolve the jurisdictional dispute which gave rise to the unfair labor practice conduct. Thus, Section 10(k) provides that

> the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute * * *

As Judge Mackinnon pointed out in dissent (App. A, pp. 58-59, emphasis in original), the "words 'such dispute' in section 10(k) *refer to the dispute out of which the unfair labor practice arose* and the statute provides that is the jurisdictional *strike* in which the striking union attempts to force the employer to assign particular work to employees in its union." Since both the employer and the striking union were the parties to that dispute, the Board correctly concluded that the subsequent phrase in Section 10(k)—"the parties to the dispute"—encompasses not only the

competing unions but also the employer involved. Hence, unless all three parties—the two unions and the *employer*—have "agreed upon methods for the voluntary adjustment of the dispute," the Board itself must determine the dispute under Section 10(k).

The Board adopted this view of the relationship between Sections 8(b)(4)(D) and 10(k) shortly after the enactment of those provisions and since then has consistently decided 10(k) cases on this basis.[7] Moreover, the courts of appeals that have had occasion to review Board action in jurisdictional dispute cases have heretofore accepted the Board's view. See *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 326 F.2d 213, 216 (C.A. 3); *Local 450, International Union of Op. Eng.* v. *Elliott*, 256 F.2d 630, 635-636 (C.A. 5); *New Orleans Typographical Union No. 17* v. *National Labor Rela-*

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[7] See, *e.g.*, *Lodge 68 of the Int'l Ass'n of Machinists (Moore Drydock Co.)*, 81 NLRB 1108, 1113-1114 (1949); *Int'l Longshoremen's Union, Local No. 16 (Juneau Spruce Corp.)*, 82 NLRB 650, 655-656 (1949); *United Brotherhood of Carpenters, Local 943 (Manhattan Construction Co.)*, 96 NLRB 1045, 1048-1049 (1951); *Int'l Union of Operating Engineers, Locals 17, 17A, and 17B (Empire State Painting Co.)*, 99 NLRB 1481, 1485 (1952); *United Ass'n of Journeymen, etc., Local 428*, 108 NLRB 186, 197-198 (1954); *Millwrights Local 1102, United Brotherhood of Carpenters (General Riggers and Erectors, Inc.)*, 127 NLRB 26, 29 (1960); *Int'l Union of Operating Engineers, Local 66 (Frank P. Badolato & Son)*, 135 NLRB 1392, 1395-1396 (1962); *Newspaper & Mail Deliverers' Union of New York (News Syndicate Co.)*, 141 NLRB 578, 580 (1963); *Operative Plasterers Int'l Ass'n (Twin City Tile and Marble Co.)*, 152 NLRB 1609, 1611, 1615 (1965); *Int'l Union of Operating Engineers, Local 49 (Egan-McKay Electrical Contractors, Inc.)*, 164 NLRB 672, 673 (1967).

tions Board, 368 F.2d 755, 763 (C.A. 5). See also *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690, 2692 (C.A. D.C.), March 29, 1966, concurring opinion of Chief Judge Bazelon.

The court below construed the term "such dispute" in Section 10(k) to refer only to the jurisdictional dispute as to which union will be assigned the work in question, concluding that only the competing unions are parties to that dispute. The court relied primarily on the ground that the employer in a jurisdictional dispute is a "neutral * * * caught in the crossfire between the disputing unions and unable to satisfy either," and that the "purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups"; he "cares not how the dispute is decided but wants merely that it be decided" (App. A, pp. 37-38).

The notion that an employer is necessarily a neutral party in a jurisdictional dispute is contrary to economic realities, particularly in the building and construction industry. There are, to be sure, many jurisdictional disputes in which the employer may be indifferent as to which group of the competing employees performs the work.[8] But there are many other

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[8] This was the situation, for example, in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union (CBS)*, 364 U.S. 573, relied on by the court below (App. A, pp. 36-38), where the employer, employing both technicians and stage hands, was neutral as to which group performed the lighting work in dispute. The Court there was not concerned with the issue presented in this case but merely with whether the Board, when it concededly had jurisdiction under Section 10(k), was required to decide the jurisdictional

disputes in which the employer's economic interests will be directly affected by the assignment of the work and in no meaningful sense can it be said that he is a neutral in the dispute or indifferent to its resolution. A change in the assignment of the work may result, for example, in different terms or conditions of employment, replacement of employees with outsiders, higher wages or costs, or even the displacement of the employer himself. In the instant case, for example, neither Texas State nor Martini has an agreement with Plasterers—both had a contract with the Tile Setters governing the work in dispute; an award of the work to Plasterers would have required these contractors either to hire a new complement of employees represented by Plasterers or to give up their subcontract.

Indeed, the fact that the National Joint Board included employer groups in its structure[9] is a dra-

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dispute on its merits, taking into account all relevant criteria, or was limited to determining whether one union was entitled to the work by virtue of an outstanding Board certification or contract. The Court held that the Board had the former duty, which it fully discharged here (see n. 5, *supra*).

[9] The Joint Board was created by agreement between the Building and Construction Trades Department, AFL-CIO and the Associated General Contractors of America and eight specialty contractors' associations. J. Dunlop, *Jurisdictional Disputes*, New York University, Second Annual Conference on Labor, 496. The agreement, which became effective May 1, 1948, specifically provided that "only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO shall be considered as bound by this agreement when they have signed a stipulation setting forth that they are willing to

matic acknowledgement by the member unions of the importance of the employers' full participation in the dispute settlement processes, as well as their vital interest in the outcome of the Joint Board's decision. As John Dunlop, the first chairman of the Joint Board, pointed out: "The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues and both have a vital contribution to make to their orderly settlement." J. Dunlop, *Jurisdictional Problems in Construction Industry*, 40 LRRM 18, 19. He further explained:

> The fact that some unions work exclusively, as a matter of policy or custom, for particular contractors tends to convert competition among contractors also into jurisdictional disputes between unions. If a contractor is to hire such a craft he must also hire a sub-contractor. More accurately, the dispute is between a contractor and a union on one side against another contractor and union on the other side.[10]

In view of the employer's potentially vital interest in the outcome of these disputes, it is highly unlikely that Congress intended, as the court below implies, to exclude employers from the dispute settlement process.

The Board's construction of the Act fully comports with Congress' intent to encourage private settlement of jurisdictional disputes. Thus, if all the parties to

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subscribe to and be bound by the terms and provisions of this agreement." Plan for National Joint Board for Settlement of Jurisdictional Disputes, Article III, Sec. 7.

[10] Dunlop, *op. cit.*, n. 9, *supra*, at 486.

the dispute have in fact agreed upon a method of adjustment, the Board will not hold a Section 10(k) hearing if one or more of the parties, including the employer, either refuses to utilize the agreed-upon method or to abide by its decision. And, if that decision rejects the work claim of the striking union and it nonetheless continues to strike, the Board will immediately proceed on any 8(b)(4)(D) unfair labor practice charge filed against that union. See *Int'l Brotherhood of Teamsters, etc., Local No. 236 (Wm. F. Trayler)*, 97 NLRB 1003, 1006-1007 (1952); *Local Union No. 9, Wood, Wire, and Metal Lathers Union (A. W. Lee, Inc.)*, 113 NLRB 947, 953-954 (1955); *Wood, Wire and Metal Lathers Union, Local No. 2 (Accoustical Contractors Ass'n of Cleveland)*, 119 NLRB 1345, 1350-1355 (1958); *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 410 F.2d 5, 8-9 (C.A. 3), certiorari granted on other grounds, 397 U.S. 905; 29 C.F.R. 102.93.

b. The legislative history does not support the decision below. The debates and committee reports do not discuss what Congress meant by the term "parties to such dispute" in Section 10(k). As Judge MacKinnon pointed out in his dissent below, "there is a very good reason" why the "members of Congress just did not address themselves to the point" (App. A, p. 56):

> The bill originated in the House and at that stage it merely defined jurisdictional strikes and made them unlawful * * *. This treatment of juris-

> dictional strikes was supplanted in the Senate bill by a section 10(k) the principal provision of which empowered and authorized the NLRB to appoint an arbitrator to hear and determine such disputes. This provision for the NLRB appointment of an arbitrator was removed in the Conference Committee and section 10(k) then for the first time assumed its present character * * *. While the 10-day provision was always a part of 10(k) from the time it emerged in the Senate bill it attracted no notice because it was always overshadowed by the provision for the Board to appoint an arbitrator.[11]

The expressed hope of Senator Morse that Section 10(k) would encourage unions to set up machinery for the settlement of jurisdictional disputes within their own ranks (App. A, pp. 39-40) does not suggest a different conclusion. In the statement the court cited, Senator Morse specifically referred to union machinery "settling such disputes *short of economic action*" (*id.* at 40 emphasis added). In other words, he believed that, with the threat of governmental resolution of the dispute under Section 10(k) hanging over their heads, the unions would in most cases resolve the dispute among themselves *without* embroiling the employer through coercive economic action; his comments do not indicate that, once such action is utilized, the unions could, under Section 10(k), settle the dispute solely between themselves without the em-

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[11] The legislative history is detailed in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union (CBS)*, *supra*, 364 U.S. at 581-582.

ployer's participation.[12] Indeed, Senator Morse did not address himself in any way to the situation in which the employer asserted an interest in the outcome of the dispute.

c. Finally, the court below found "persuasive evidence" for its view in the "fact that the employer is not bound by a 10(k) determination of the Board" (App. A, p. 33). To be sure, the statute does not compel the employer to abide by a 10(k) determination. But this does not lessen the employer's direct interest in the resolution of the dispute or relegate him to the status of a disinterested neutral "who cares not how the dispute is decided but wants merely that it be decided" (App. A, p. 38). Moreover, since the successful union in the Section 10(k) proceeding can utilize economic pressure to enforce the award against the unwilling employer without violating Section 8(b)(4)(D),[13] the employer, as a practical mat-

[12] The passage from the House Conference Report, relied on by the court below (App. A, p. 40), likewise does not aid its position. While the language italicized by the court states that Section 10(k) would empower the Board to hear and determine "disputes between unions," this language is followed by the phrase "giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes)." Since a jurisdictional strike necessarily implicates the employer, the passage as a whole can just as readily be read as supporting the Board's view that, by the time a jurisdictional dispute is ripe for Board determination under Section 10(k), there are three parties—the two unions and the employer who is being pressured to change his work assignment.

[13] By its terms, Section 8(b)(4)(D) exempts economic pressure where the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Since the

ter, is under compelling pressure to accept a 10(k) determination.[14] See also *Local 502, Int'l Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963).

2. The question whether the Board may hear and determine jurisdictional disputes where the unions, but not the employer, have agreed to be bound by a voluntary method of adjustment is, as the cases cited in note 7, *supra*, show, an important and recurring one in the administration of the Act. The issue has taken on additional importance by reason of the recent withdrawal of the Associated General Contractors of America ("AGC") from participation in the Joint Board plan.[15] The decision of the court below thus

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decision in *Radio Engineers Union*, n. 8, *supra*, requiring the Board to determine a jurisdictional dispute on its merits, the Board's General Counsel has viewed a Board 10(k) award as an "order" within the meaning of the exemption to Section 8(b)(4)(D). See *Hoisting and Portable Engineers Local 701*, Case No. 36-CD-55.

[14] Where the employer has not agreed to be bound by a Joint Board decision, a union which gets an award in its favor may be able to obtain, in a suit under Section 301 of the Labor Management Relations Act (29 U.S.C. 185), an order compelling the losing union to abandon its claim to the work in dispute; but such an order does not necessarily require the employer to assign the work to the winning union.

[15] AGC is a national association representing approximately 9,000 general construction contractors throughout the country, who perform about 80 percent of the construction in the industry; there are also numerous specialty contractors who hold associate memberships in local chapters of the AGC. Motion of AGC for leave to file Memorandum *Amicus Curiae* in support of the Board's Petition for Rehearing, p. 2. "In 1969, upon due notice and after failing in lengthy negotiations to secure certain reforms in the Plan, the AGC terminated the

clouds with uncertainty the Board's role in the determination of a substantial number of jurisdictional disputes. A prompt resolution of the issue by this Court is accordingly required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD B. STONE,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARVIN ROTH,
Attorney,
National Labor Relations Board.

DECEMBER 1970.

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current Joint Board Plan. The AGC later refused to become a signatory to a new Plan that went into effect on April 3, 1970 * * *." Memorandum *Amicus Curiae* of the AGC, pp. 4-5. (These documents were filed in the court of appeals.)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,073

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., AND LOCAL UNION 20 BRICKLAYERS, ETC., LOCAL UNION 108 INTERNATIONAL ASSOCIATION OF MARBLE, ETC., POLISHERS, ET AL., INTERVENORS

On Petition to Review and on Cross-Petition to Enforce an Order of the National Labor Relations Board

Decided June 30, 1970

Judgment entered this date

Mr. Donald J. Capuano, with whom *Mr. Martin F. O'Donoghue* was on the brief, for petitioner.

Mr. Peter Ames Eveleth, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General

Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, *Elliott Moore* and *Hans J. Lehmann*, Attorneys, National Labor Relations Board, were on the brief, for respondent.

Mr. Wayne S. Bishop for intervenors, Tile Contractors Association of America, Inc., Texas State Tile & Terrazzo Co., et al.

Mr. Jerry D. Anker for union intervenors.

Messrs. Louis Sherman and *Elihu I. Leifer* filed a brief on behalf of the Building and Construction Trades Department, AFL-CIO, as *amicus curiae.*

Miss Leslie Thacker filed a brief on behalf of Ceramic Tile Institute of America, et al., as *Amicus Curiae.*

Before: MCGOWAN, LEVENTHAL and MACKINNON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* This appeal concerns the provisions of the National Labor Relations Act ("Act"), 29 U.S.C. § 141 et seq., applicable to jurisdictional disputes. The particular jurisdictional dispute involves whether the job of applying a coat of mortar on a wall to be tiled should be given to the Plasterers or the Tile Setters (that is, to petitioner, Plasterers Local Union No. 79, Operative Plasterers and Cement Masons' International Assn., AFL-CIO, or to intervenor, Tile Terrazzo and Marble Setters Local Union No. 20 of the Bricklayers, Masons and Plasterers International Union).

Following a hearing pursuant to § 10(k) of the National Labor Relation Act,[1] the National Labor Relations Board hereafter "Board," awarded the

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[1] 29 U.S.C. § 160(k).

work in dispute to the Tile Setters.[2] The issue is whether it was error for the Board to have conducted a 10(k) hearing after being timely advised that both unions had agreed to be bound by the decisions of the National Joint Board for the Settlement of Jurisdictional Disputes, an arbitration panel established by the Building Trades Department, AFL-CIO, hereafter the "Joint Board."

The Plasterers claim the Joint Board awarded the work to them,[3] and that it was error for the Board to make a 10(k) determination. The Board's position is that while it may not hold a 10(k) hearing when the parties to a jurisdictional dispute have agreed on a method for voluntary adjustment of the dispute, this bar does not arise unless all the parties to the dispute are bound by the voluntary adjustment procedure. Because the Board considers the employer to be a party to the dispute, and because the employers making work assignments in the instant disputes were not bound by the determinations of the Joint Board, the Board contends that it properly held a 10(k) hearing.

These questions are before this court on the petition of Plasterers to review, and the cross-application of the Board to enforce, a June 27, 1968 order in which the Board found that Plasterers had committed an unfair labor practice in violation of § 8(b) (4) (D)

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[2] The Board's Decision and Determination of Disputes under § 10(k) was issued on August 22, 1967, and is reported at 167 NLRB No. 23.

[3] The Plasters also argue that assuming statutory authority to make an award, the Board's decision and order were arbitrary as reflecting an excessive weight given by the Board to the factor of the employer's assignment, and a failure to give due consideration to other factors which supported the Plasterers claim. Our disposition of this appeal makes it unnecessary to reach this question.

of the Act [4] by picketing Texas State Tile and Terrazzo Company (Texas State), and Martini Tile and Terrazzo Company (Martini), with the object of forcing these employers to assign the disputed work to employees represented by Plasterers.[5]

We agree with the Plasterers that the Board may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions have agreed to settle their dispute through binding arbitration. In as much as the Board's finding on an 8(b) (4) (D) violation incorporates and relies on an invalid 10(k) proceeding and award, the Board's order cannot be enforced.

I *The Jurisdictional Disputes*

The focus of these jurisdictional disputes can be traced to the development in the mid-1950's of the thin-set or adhesive method of applying tile. Previously it was necessary to set tile in a bed of wet plaster so that moisture would not be absorbed from the bonding agent before it hardened and formed a firm bond. The application of this setting bed or float coat was the work of tile setters. The thin-set method, on the other hand, employed new bonding agents which made it possible to apply tile directly to a smooth surface of dry plaster on a thin coat of dry-set mortar. The Tile Setters contended that they should prepare this smooth plaster surface just as they had prepared the wet setting bed. The Plasterers took the position that the tile setter was only entitled to apply his setting bed and that in the thin-set method it was the dry-set mortar and not the

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[4] 29 U.S.C. § 158(b) (4) (D).

[5] The Board's Decision and Order in the unfair labor practice phase of the case is reported at 172 NLRB No. 77.

smooth and dry plaster surface which constituted the setting bed.

The order concerns picketing which was directed against two different employers, at the sites of two unrelated jobs. The first was the M. D. Anderson Library Job at the University of Houston. Southwestern Construction Co., the general contractor for an addition to the library, had subcontracted to Texas State, a tile contractor employing members of the Tile Setters Union, the work of preparing walls and applying tile to four stairwells and two restrooms on each floor of the eight story building. The tile setters did their initial work in the lavatories where they applied the smooth coat of plaster. The Plasterers claimed this work as theirs, and when this claim was rejected by Tile Setters they submitted the dispute to the Joint Board.

On November 9, 1966, the Joint Board awarded the work in dispute to the Plasterers except that "any coat to be applied wet the same day under tile" was to be placed by Tile Setters. The award stated: "In the thin-set or adhesive method of applying tile to walls and ceilings, the plasterer shall apply the first and second coats of mortar that is the scratch coat and plumb coat. The plasterers shall plumb, rod and square all walls, rod and level all ceilings and the tile setter shall apply the final setting bed for his tile."

Plasterers thereupon claimed the remaining work of applying a smooth plaster coat on the basis of the award. The Tile Setters refused to relinquish the work, contending that the smooth plaster coat was the tile setter's "setting bed" and that therefore the Joint Board Award actually supported their claim. On January 24, 1967, Plasterers established a picketline on the jobsite and a work stoppage ensued. Southwestern Construction Company filed an unfair labor practice charge with the Board against Plasterers.

On February 10, 1967, the United States District Court for the Southern District of Texas granted the application of the Board's regional director for an injunction against the picketing and the pickets were removed.

On March 6, 1967, Plasterers requested that the Joint Board clarify its award in view of the contention of the Tile Setters that the award favored their claim. On March 15, 1967, the Joint Board issued a clarification which is set out in part in footnote.[6] The Joint Board made clear that the job of applying a smooth coat of plaster material to an initial scratch coat or to cement or clay tile walls was the work of the Plasterers unless the tile is set the same work day that such coat of plaster is applied.

The second job at which picketing occurred was at the Rainbo Bakery. Here there was no general contractor. Martini, who did not employ plasterers, had a direct contract with the owner calling for the tiling of two walls in one area of the bakery. Tile setters undertook to perform the application of a smooth coat of plaster to metal lath which had been tacked to

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[6] The Joint Board voted to clarify its job decision by stating that the coat of plaster material which is applied directly to the initial scratch coat or directly to clay title or cement block walls is for the primary purpose of plumbing, rodding and squaring of walls to receive tile and, in accordance with the agreement of record and the decision of record referred to above, shall be assigned to plasterers.

The Joint Board, in recognition of the problems created by having two different trades working at the same time on separately identifiable work operations, further voted that if the tile to be adhered to the coat of plaster material applied to the initial scratch coat or directly to clay tile or cement block walls is set during the same work day in which such coat is applied the plaster materials shall be applied by tile setters in the interest of efficient job operation.

masonry walls, and the application of dry-set mortar and tile to this plaster surface. The dispute was never submitted to the Joint Board. On March 17, 1967, two days after the clarification by the Joint Board described above, Plasterers picketed the jobsite for the purpose of having transferred to them that part of the work consisting of application of the smooth coat.

II *The NLRB Proceedings*

On April 6, 7 and 10 through 14, 1967, the Board held a consolidated § 10(k) hearing to determine these jurisdictional disputes. It issued its decision and determination on August 22, 1967. The Board rejected the Plasterers' contention that the notice of hearing should be quashed because the disputing unions had agreed on a method for voluntary settlement. It stated: "The Board has consistently held that the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute." On the merits of the dispute, the Board examined what it considered to be the relevant factors and concluded that Tile Setters were entitled to the work in dispute inasmuch as there was no significant difference between the two employee groups in terms of skill, and the various factors involved were all consistent with the employers assignment of the disputed work.

When Plasterers refused to comply with the Board's determination of the work disputes, the General Counsel of the Board issued a complaint against petitioner alleging a violation of § 8(b) (4) (D) of the Act. At the unfair labor practice hearing held on October 30, 1967, the parties agreed to submit on the record in the § 10(k) proceeding. In its decision and order of June 27, 1968, the Board again rejected Plasterers' claim

that the 10(k) proceeding was improperly held and found that the union had violated § 8(b) (4) (D). The Board's order provides that the union shall cease and desist from the use of prohibited means to force or require Texas State or Martini to assign to Plasterers the disputed work at the Anderson Library and Rainbo jobs. The Board also ordered that Plasterers take the affirmative action of posting a notice indicating their intention to abide by the Board's cease and desist order. The Board's petition for enforcement is predicated on Plasterers' refusal to take this affirmative action.

III *Mootness*

A motion to dismiss this case as moot has been filed by intervenor Tile Setters, and the other union intervenors associated with them.[7] They argue that mootness follows from the fact that the Anderson Library and Rainbo Bakery jobs have been completed and that the Board's cease and desist order now proscribes conduct in which it would be impossible for the Plasterers to engage. Both Plasterers and the Board have filed memoranda arguing that the case is not moot.

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[7] The other Union Intervenors are: Bricklayers, Masons and Plasterers International Union of America, hereafter "Bricklayers", International Association of Marble, Slate and Stone Polishers, Rubbers & Sawyers, Tile & Marble Setters' Helpers & Marble, Mosaic and Terrazzo Workers' Helpers, hereafter "Helpers," and Local 108 of the Helpers. Bricklayers is the parent organization of Tile Setters Local 20, whose members were performing the work sought by the Plasterers. The Helpers Union was also interested in the dispute because its members work directly with the Tile Setters, and would be replaced by members of another organization (Laborers' International Union of America) if the disputed work were assigned to the Plasterers.

Cease and desist orders of the Board aimed at remedying an unfair labor practice are frequently framed to account for changes in circumstances following the illegal practice. However, the issue of whether an unfair labor practice occurred is not mooted because the particular job involved has been completed. *Local 74, United Brotherhood of Carpenters & Joiners* v. *NLRB*, 341 U.S. 707, 715 (1951); *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271 (1938); *NLRB* v. *Plumbers Union of Nassau County*, 299 F.2d 497 (2d Cir. 1962).

There is precedent permitting the Board to quash a 10(k) proceeding where there could only be a stale hearing, held three years after the incident, and to dismiss the 8(b) (4) (D) complaint on the ground that "no affirmative order issued by the Board could have any effect on the parties to the original controversy since the work had long since been completed," *Tip Top Roofers, Inc.* v. *NLRB*, 324 F.2d 773 (5th Cir. 1963). But here the Board has issued an affirmative order, requiring *inter alia* the posting of notices, and Plasterers has refused to comply. We see no basis on this record for concluding that the Board acted impermissibly in viewing the controversy as being sufficiently broad and enduring to make appropriate affirmative relief. If the posting order was lawful the Board was entitled to a judicial decree of enforcement. The case is not moot.

IV *Proper Construction of Section 10(k) of the National Labor Relations Act*

The Board's reliance on the 10(k) record and determination in reaching its conclusion that Plasterers had committed an unfair labor practice preserves the 10(k) issue as a part of the review of the unfair

labor practice determination.[8] The case turns on the proper construction of § 10(k) of the National Labor Relations Act, one of the provisions added by the Taft-Hartley Amendments of 1947 as a result of Congressional concern over work stoppages arising out of jurisdictional disputes between unions.

Another provision added at the same time was § 8 (b) (4) (D), set forth in the footnote,[9] which broad-

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[8] "Since there is no independent review of § 10(k) work assignments, the only stage at which the [union] can contest the work award is on review of the § 8(b) (4) (i) (ii) (D) unfair labor practice order. If the § 10(k) order falls, the unfair labor practice order falls with it." NLRB v. Local 991, ILA, 332 F.2d 66 (5th Cir. 1964).

[9] (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

* * * *

However, § 8(b) (4) (D) must be read in the light of § 10(k) which provides:

[Footnote continued on page 31]

ly prohibits a union from picketing and other actions to induce employees not to perform services for their employer with the object of forcing the employer to assign work to a particular union or craft.

Section 10(k), also set forth in footnote 9, empowers the Board to determine the jurisdictional dispute out of which the unfair labor practice charge has arisen, unless, in the words of an abstention provision, "the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."

The Board held this abstention language of §10(k) inapplicable, even though the unions had agreed to be bound by the decisions of the Joint Board for the Settlement of Jurisdictional Disputes—a joint board with representatives of employers and employees,[10]—

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[9] [Continued]

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance of the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

[10] The amicus brief filed by the Building and Construction Trades Department, AFL-CIO, urging the adoption of the construction of § 10(k) advanced by Plasterers, describes the operation of the Joint Board. Article X of the Department's constitution provides that all jurisdictional disputes shall be settled and adjusted according to a plan established by the Department and that such plan "shall be recognized as final

on the ground that the employer was also a "party" and had not agreed to this method for voluntary adjustment.

In our view the Board erred in claiming authority under § 10(k) of the Act to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes.

Meaning of Abstention Provision of § 10(k)

The crucial abstention provision does not require voluntary adjustment, or agreement on a method for voluntary adjustment, on the part of all parties to the 8(b) (4) (D) proceeding, or even all parties to the 10(k) proceeding. Abstention is commanded when "the parties to such dispute" have adjusted the dispute, or agreed on a method for the adjustment of the

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and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions." The disputing unions in the instant case, the Bricklayers and the Plasterers International Unions and their affiliated locals, the petitioner and intervenor, are affiliated with the Department.

The present "Plan for National Joint Board for Settlement of Jurisdictional Disputes" became effective on April 1, 1965. The Plan operates through the Joint Board, the Appeals Board and Hearings Panels established to render nationally effective decisions on an ad hoc basis. These Boards and Panels have both labor and contractor members, and the criteria for decision include inter-union agreements dividing work (the Green Book), established trade practice, practice in the locality and such factors as efficiency and economy of operation. The machinery of the Plan is operative regardless of whether or not the particular employer affected by such a dispute decides to be bound to the Plan. The Plan provides that any decision of the Joint Board, or of the Appeals Board if an appeal it taken, "shall be immediately accepted and complied with by all parties to this Agreement."

dispute. The text of § 10(k) shows that the term "such dispute" refers to the underlying jurisdictional "dispute out of which such unfair labor practice shall have arisen." It is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question.

Congress could have written § 10(k) so that the employer would be a necessary party to a procedure for voluntary settlement by requiring agreement on such a procedure by both the parties to the unfair labor practice charge and the parties to the underlying dispute out of which that charge arises. That Congress did not choose this approach but instead required only agreement by the unions involved in the underlying jurisdictional dispute is easily understood in the light of the refusal of Congress to bind the employer to the Board's determination of a jurisdictional dispute under § 10(k). Rather than enacting a comprehensive solution to the work assignment problem, which would have required provision for binding the employer to a determination concerning who was entitled to the work. Congress went only so far as to assure that at least the employer would not be plagued by the failure of the disputing unions to resolve their dispute. The fact that the employer is not bound by a 10(k) determination of the Board is persuasive evidence that Congress did not intend a voluntary procedure for adjustment to be held inadequate because the employer is not bound.

Although the precise question before us is, in any meaningful sense, one of first impression in the federal courts,[11] we find authority for our view not only

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[11] We do not read the cases cited in footnote 2 of the dissenting opinion as authoritative support for the Board's position. While we would not pass over a reasoned view contrary to the

in the text of § 10(k) but also in judicial precedents construing the provisions of the Act dealing with jurisdictional disputes and in the legislative history and congressional purpose underlying these provisions.

Protection Pending Determination under Voluntary Procedure

We interject preliminarily the observation that the provision for Board abstention pending resort to a voluntary adjustment procedure does not remove the machinery provided by the Act for interim protection against work stoppages.

Congress gave to the Board authority to insure that the jurisdictional dispute will not be the cause for further work stoppage while either voluntary procedures, or Board-conducted procedures for determination under § 10(k), are running their course. Section 10(*l*), quoted in the footnote,[12] authorizes the

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one here taken, these cases do not attempt to grapple with the issue before us apparently for the reason that they are not cases where the Board's interpretation was challenged or where disposition turned on the resolution of this issue. The Board's brief candidly admits that these cases have no more than "adverted to" the issue before us and contends merely that they "reflect" its view.

[12] (*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in

question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law; *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

The vigilance of the General Counsel in applying for injunctions in 8(b) (4) (D) cases was noted in K. Strand, Jurisdictional Disputes in Construction: The Causes, the Joint Board and The NLRB 119, n. 1 (1961).

Board to seek a District Court injunction whenever the cognizant Board employee has reasonable cause to believe in the truth of a charge of an unfair labor practice violative of § 8(b) (4) (D). That injunction remains in effect "pending the final adjudication of the Board with respect to such matter." Where the Board is conducting a 10(k) proceeding it must make a final determination under § 10(k) before it may proceed to final adjudication of an 8(b) (4) (D) charge. In a case governed by the abstention provision of § 10(k) the proceeding on the 8(b) (4) (D) charge stays in being and is not dismissed unless and until the parties have not only agreed on methods for voluntary adjustment but have actually reached a voluntary adjustment of their dispute. Thus the Act provides a "speedy remedy . . . to preserve the status quo" [13] and avoids any hiatus in protection against forbidden means of pressing jurisdictional claims.

CBS Opinion

Focusing on § 10(k) we find guidance and indeed instruction on its meaning, its inter-relationship with § 8(b) (4) (D), and the pertinent legislative history, in *NLRB* v. *Radio and Television Broadcast Engineers Union* [*CBS*], 364 U.S. 573 (1961).

First, as to the meaning of the terms of § 10(k), the Supreme Court said (364 U.S. at 579): "[T]he clause 'the dispute out of which such unfair labor practice shall have arisen' can have no other meaning except a jurisdictional dispute under § 8(b) (4) (D) which is a dispute between two or more groups of employees over which is entitled to do certain work

[13] Local 450, International Union of Operating Engineers, AFL-CIO v. Elliott, Regional Director, 256 F.2d 630, 634 (5th Cir. 1958).

for an employer." Since a jurisdictional dispute for purposes of § 10(k) is a "dispute between two or more groups of employees," it follows that these employee groups are "the parties to such dispute" for purposes of determining whether there exists a voluntary adjustment procedure within the abstention provision of 10(k).

Second, as to the purpose of § 10(k), the Court stressed that "§ 10(k) offers strong inducements to quarrelling unions to settle their differences . . . ." 364 U.S. at 577.[14] Where the quarrelling unions have agreed on a procedure for settling their differences, the purpose of § 10(k) to induce settlement is manifestly served by respecting their use of the agreed procedure.

As to the purpose of § 10(k) and § 8(b) (4) (D) taken together, the Court noted that the legislative history contained a recognition of "the necessity of enacting legislation to protect employers from being 'the helpless victims of quarrels that do not concern them at all'," *id.* at 580-81, i.e. to protect the neutral employer caught in the crossfire between the disputing unions and unable to satisfy either, in other words "caught between the devil and the deep blue." 364 U.S. at 575. The purpose of protecting the neutral employer is fully served by any binding settlement

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[14] This is reenforced by the Court's reference, to the history of these provisions, which came in the wake of a "continuing and widely expressed dissatisfaction with jurisdictional strikes." *See* 364 U.S. at 580, where the Court continued:

> As one of the forerunners to these very provisions of the Act, President Truman told the Congress in 1947 that disputes "involving the question of which labor union is entitled to perform a particular task" should be settled, and that if the "rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issues."

between the disputing employee groups. The neutral employer is one who cares not how the dispute is decided but wants merely that it be decided.

Further Examination of Legislative History

We have undertaken a fresh examination of the relevant legislative history. That history forcefully supports the conclusion that Congress intended in § 10(k) to encourage disputing unions to establish inter-union machinery for settling jurisdiction disputes and to afford them an opportunity to exhaust this machinery.

The original Honse bill contained nothing comparable to § 10(k). Senator Morse, who proposed the forerunner provision which emerged, with relatively minor modification, as § 10(k), prepared a "definitional" memorandum, which stated that while there are various kinds of "jurisdictional disputes" they have as their common ingredient a controversy between two or more labor unions." I Legis. Hist. 951.[15]

Senator Morse proposed a subsection (k) which, as appears from its text in the footnote,[16] is virtually

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[15] "Legis. Hist." refers to the compiled Legislative History of the Labor Management Relations Act, 1947, published by the NLRB (1948).

[16] *See* II Legis. Hist. 987: "(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (2)(A) of section 8(b), the Board is empowered to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within 10 days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator

the same as what is now § 10(k). It provided for Board determination of "the dispute out of which such unfair labor practice shall have arisen" unless "the parties to such dispute . . . have adjusted or agreed upon methods for the voluntary adjustment of such dispute." (Senator Morse also proposed enlargement of definition of unfair labor practices and authority in the Board to seek Federal injunctions pending determination of the disputes.). In supporting his proposal he referred to his own experience during World War II as a member of the War Labor Board whose undertaking of jurisdiction to determine jurisdictional dispute work stoppages resulted in a policy whereby "we would give the union leaders involved in a jurisdictional dispute 24 hours to proceed to settle the dispute without a work stoppage, and upon their failure to do so we would appoint an arbitrator whose decision would be final and binding." And he predicted that the same incentive to union settlement would follow from the post-war adoption of his proposal to amend the National Labor Relations Act. He stated:

> [P]robably one of the greatest benefits that will come from the adoption of such amendments to the Wagner Act as I am proposing this afternoon will be action on the part of the unions themselves to see to it that it does not become necessary, unless in exceptional cases, to resort

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appointed by the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

The § 8(b) (2) (A) proposed by Senator Morse was similar to what has become § 8(b) (4) (D), though it defined an unfair labor practice in terms of an inducement to refuse services "because particular work tasks of such employer or any other employer are performed by employees who are or are not members of a particular labor organization." II Legis. Hist. 986.

> to the machinery which I have proposed in these amendments . . . . because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action.[17]

While in some respects the Congress departed from Senator Morse's proposals,[18] Congress retained the thought obtained from his subsection (k), of a machinery for Board determination, an abstention provision where the parties agree on a procedure for settlement, and of an incentive to determination by the parties to the dispute. And there can be no doubt that the parties to the jurisdictional dispute were conceived of as the rival unions, or employee groups. This appears not only from the presentation of Senator Morse, but from the use of the same core concept of the underlying dispute as the jurisdictional dispute between the unions, in the House Conference Report, a document of highest standing in ascertaining legislative intent.

In its recommendation for adoption of § 10(k), the House Conference Report stated:

> The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine *disputes between unions* giving rise to unfair labor practices under section 8(b) (4) (D) (jurisdictional strikes). [Emphasis added.][19]

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[17] II Legis. Hist. 983.

[18] His subsection (k) was modified so as to make Board determination compulsory rather than discretionary and to remove the provision authorizing reference by the Board to an arbitrator.

[19] I Legis. Hist. 561.

There was general agreement on the view that § 10 (k) had merit as stimulating settlement machinery *within the ranks of labor*, agreement even from legislators opposed to other elements of the new law.[20]

Consideration of the Board's Contrary Construction of § 10(k)

The meaning of § 10(k) as we understand it is contrary to the construction announced by the Board. That agency's construction is entitled to deference. However, the text, legislative history and purpose, and precedent, combine to negative the aura of doubt which creates the occasion for giving weight to the Board's construction. *See CBS, supra*, at 585; *Truck Drivers and Helpers* v. *NLRB*, 101 U.S.App.D.C. 420, 249 F.2d 512 (1957), *cert. denied*, 355 U.S. 958 (1958). If there was room for doubt prior to *CBS*, that decision should have alerted the Board to modify its interpretation.[21]

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[20] *See* Legis. Hist. 1046, setting forth Senator Murray's favorable comment on this provision:

> We are confident that the mere threat of governmental action will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks, where they properly should be settled.

[21] In the wake of *CBS*, departing as it did from long-standing precedents and approach of the Board, commentators probing the various interrelated problems in depth attacked the Board's continuance of its definition of "parties" for purposes of § 10(k) abstention provision.

See Sussman, *Section 10(k): Mandate for Change?*, 1967 B.U.L.REV. 201, 229 ("The NLRB is incorrect in presently requiring that the employer be a party to an agreement procedure before it satisfies the standards necessary to avoid a Section 10(k) hearing"); *ABA Section on Labor Relations Law, Report of the Special Committee on the Building and*

Nor is the Board's construction entitled to greater deference because of the mere fact that the 1959 amendments to the Taft Hartley Act did not modify § 10(k). Reenactment of a section of law does not of itself constitute conclusive legislative approval of either decisions or administrative regulations construing the provision, in the absence of a showing that the attention of Congress was specifically directed to the matter at hand. That is the teaching of *Helvering* v. *Hallock*, 309 U.S. 106 (1940), and *Girouard* v. *United States*, 328 U.S. 61 (1946), decisions whose vitality is underscored by the very recent opinion in *Boys Markets, Inc.* v. *Retail Clerk's Union*, —— U.S. —— (June 1, 1970). In *Boys Market* the Supreme Court reiterated its stricture against assigning conclusive weight to congressional silence as acceptance of a ruling "in the absence of persuasive circumstances evidencing a clear design" that congressional inaction denoted acquiescence.

Although the Taft-Hartley Act was amended in 1959, there is no indication that Congress gave consideration to the issue now before us, or even to the subject of jurisdictional strikes. Its inaction concerning a provision whose meaning we do not find really doubtful is not accompanied by any circumstances or indications from which we can discern a "clear design" to accept the Board's rulings.

Additional Court Precedent

We are in accord with the reasoning in *Penello* v. *Local Union No. 59, Sheet Metal Wkrs. Int. Assn.*,

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Construction and Industry 452, 456 (1965) ("By the term 'parties' those legislators who discussed the matter indicated that Congress means the disputing unions themselves."); Cohen, *The NLRB and Section 10(k): A Study of the Reluctant Dragan*, 14 LAB. L.J. 905, 909 (1963); Note, 77 YALE L.J. 1191, 1201-02 (1968).

195 F.Supp. 458 (D.Del. 1961), which rejected the view that the employer's resistance "could be the sole factor making inoperative" the "voluntary adjustment" abstention provision of § 10(k). Judge Wright declared (at p. 466):

> Petitioner would have the Court ignore this policy of § 10(k), however, for his theory apparently is that no agreement between the groups of employees involved can stay the operation of § 8(b) (4) (D) so long as the employer does not agree. But this argument proves too much, for not only does the Supreme Court view the policies of § 10(k) as directed towards inducing voluntary settlement between the groups of employees involved, but also the language of that section would seem to compel it.

Rejection of Policy Argument of Board Counsel Overstressing Need To Obtain Employer Acquiescence

To this court counsel for the Board presented an argument on policy grounds that the Board's construction of § 10(k) is sound because it is best suited to preservation of industrial peace. We were not specifically cited to Board opinions wherein this policy was set forth by the Board as contrasted with argument of counsel. *See Braniff Airways, Inc.* v. *CAB*, 126 U.S. App.D.C. 399, 379 F.2d 453 (1967). But let us consider the contention on its merits.

Board counsel argue (Brief at 17):

> Employer acceptance of the "voluntary adjustment" is a prerequisite of final resolution of the dispute, because the employer does not commit an unfair labor practice by ignoring the award made under Section 10(k) . . . . Securing the employer's participation in the dispute-settle-

> ment phase enhances the likelihood . . . that he will accept the result. . . .

A similar starting point, that the employer is not bound by the 10(k) determination was the premise of the argument made by the Board in CBS—and without success.[22] This approach harbors the difficulty of a built-in tendency (not necessarily an absolute rule) to give controlling weight to the determination of the employer—because he is not required to comply with the determination of the Board. A similar appraisal was part of the Court's reasoning in *CBS* for rejecting the Board construction there involved (364 U.S. at 579):

> For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before the enactment of § 10(k)—with the same old basic jurisdictional dispute likely continuing to vex him, and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer.

Scope Given Voluntary Arbitration Procedures

Our conclusion that agreement for binding arbitration between the disputing unions is effective to stay

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[22] It argued that if a striking union which had no claim to the work under a Board order or certification, or a contract, established its right to the work upon the basis of such factors as custom, tradition, etc., it would be necessary, in order to prevent the 10(k) determination from being "virtually pointless," to construe 8(b) (4) (D) as permitting a union to strike to compel compliance with a 10(k) award. (Br. for NLRB at 9, 10, 20-26.) This would "encourage the very jurisdictional strikes which the Sections were intended to prevent." (Br. for NLRB at 25.)

a determination by the Board under § 10(k) is also supported by the general principle that full scope should be given to voluntary arbitration procedures. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964). Not least of the advantages is the relative speed of voluntary arbitration, as compared with Board adjudicatory procedures—a matter of manifest significance in the handling of jurisdictional strikes.[23]

Importance of Permanent Resolution of Dispute

Furthermore, and significantly, the availability of a binding agreement between the disputing unions creates means of enforcing a permanent resolution of the jurisdictional dispute not otherwise available to the Board. The Act does not authorize the Board to compel an employer to change his assignment, or a union to renounce an assignment that the employer is willing to give. But an award arising out of voluntary binding arbitration can be enforced by peaceful means. The impetus for unions to live up to interunion agreements rests on reinforcing considerations of honor, reciprocity, mutuality—and enforceability. The winning union may bring an action, either in federal court under § 301 of the Taft-Hartley Act or in state court, to secure injunctive relief against a union that has failed to abide by its agreement to honor the Joint Board decision and renounce the work.[24]

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[23] K. Strand, Jurisdictional Disputes in Construction: The Causes, The Joint Board and the NLRB 103-104 (1961).

[24] Additional avenues to enforcement are provided by the Joint Board itself. The Joint Board's procedural Rules and Regulations set out compliance procedures which provide, *inter alia*, that when a union is declared to be in noncompliance, no job decisions shall be issued in favor of that trade

While delay may be involved before the union can secure an adjustment in fact, e.g., by prevailing in its suit for enforcement of the arbitration agreement, the public interest is safeguarded in the interim by the injunction obtained under § 10(*l*). That injunction remains in effect pending the ultimate adjustment, and may, indeed, give the winning union incentive to pursue with diligence legal enforcement of an award in its favor. Problems may arise in fact under this procedure if the employer tempts the losing union with continued offers of the work in dispute, but to give the losing union a legal right to another bite at the apple in the 10(k) proceeding is only to permit the jurisdictional battle to begin anew as a matter of right and principle, whereas a central objective of § 10(k) is to strengthen enforcement of agreements reached by the unions.

The construction of § 10(k) approved today means that proceedings on 8(b) (4) (D) unfair labor practices charges may be terminated because of union agreements reached after the proceedings are begun. But that is precisely the purpose of § 10(k) as expressed in *CBS*, where the Court said (364 U.S. at 576-77):

> Section 10(k) . . . quite plainly emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions.

It also means that proceedings may be dismissed although an employer is dissatisfied with, and would prefer to contest and litigate, the agreement reached by the unions. The special provisions were passed, however, to protect the employer who was "neutral" in the dispute.

Special Provisions of § 10(k) Inapplicable to Employers Not Truly Neutral in Jurisdictional Dispute

An employer properly has standing under these provisions when he is plagued by employee groups that do not agree, and not when he is dissatisfied with the way they do agree. This principle has indeed been recognized by the Board's so-called Safeway doctrine in cases where an unfair labor practice violation has been followed by actual agreement between unions, with renunciation of the work.[25] In

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[25] Highway Truckdrivers & Helpers, Local 107, Int'l Bhd of Teamsters (Safeway Stores, Inc.), 134 NLRB 1320 (1961); Local 1905, Carpet Linoleum & Soft Tile Layers (Butcher and Sweeney Constr. Co.), 143 NLRB 251 (1963).

In Quinn v. NLRB (Don Cartage Co.) 61 LRRM 2690 (1966) this court remanded a Board disposition of a 10(k) proceeding made on the basis of a decision by one union renouncing the particular work. This was *not* accepted as a settlement of the dispute by the other union. The Board decided that the dispute before it in the 10(k) proceeding should be limited to the particular work, leaving the broader dispute for reference to the new Joint Board established in 1965, which heightened provision for employer participation and attention to employer interests (*see* note 27, *infra*). That 1965 procedure to settle the broad dispute was established more than 10 days after the charge was filed in 1964, and hence, under the terms of § 10(k), came too late to be a mandatory procedure even if the 10(k) proceeding was viewed as extending to the broad dispute. This court held that the 10(k) dispute involved in that case was a broad dispute—the case having taken shape, by agreement of all parties, including the Board's General Counsel, as relating to the broad, continuing dispute, and a long proceeding, with full evidence, had been held on the issue given this scope. All that was involved was a ruling that on the facts of that case the Board had abused its discretion in endeavoring to narrow the dispute awaiting its determination.

those cases the Board agrees that there is no longer a jurisdictional dispute.

The essential point is that the employer's economic interests do not require the Board to pursue the matter under § 10(k) even though (a) there was an unfair labor practice under § 8(b) (4) (D) in the first instance and (b) the employer is not really neutral as between the unions but makes it clear that he is dissatisfied with the adjustment on which they have agreed. The same principle is fairly operative when the unions have agreed on a method for obtaining an adjustment, a binding arbitration that the unions will generally observe and have power to enforce.

The Taft-Hartley Act, though broad and unqualified in its terms, must be taken in light of its dominant purpose to protect "neutral" employers. This aspect of the "common law" of labor relations has been infused into the meaning of the Act in cases involving the provisions of the law broadly prohibiting secondary boycotts.[26] A similar principle is also applicable to ensure the kind of application of the jurisdictional dispute provisions that was intended by Congress.

We need not consider whether in some other case the Board could continue with a § 10(k) proceeding because the rival employee groups had not reached an actual agreement and their agreement on a procedure for adjustment was subject to an infirmity that undercut its fairness and reliability as a method of achieving the industrial peace that is the ultimate objective of Congress.[27] It may also be that the Board

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[26] Woodwork Mfg. v. NLRB, 386 U.S. 612, 625; International Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950), *aff'd.*, 341 U.S. 694 (1951).

[27] Thus, we need not consider the efficacy for purposes of § 10(k) of an inter-union proceeding that made no realistic

has discretion to conclude that a paper agreement between disputing unions does not in fact reflect an operative mechanism likely to resolve the dispute. No such contention has been advanced by the Board either as to the general operation of the Joint Board plan or as to its handling of this particular inter-union dispute. Under these circumstances we hold that the presently operative Joint Board plan which creates in the unions not entitled to disputed work a legally enforceable obligation to renounce the work can be and was intended by Congress to be perserved as a private-ordering mechanism for the resolution of jurisdictional disputes. We conclude that § 10(k) was intended to give full play to this private-ordering mechanism, and requires the Board to abstain from adjudication while it is being pursued.[28]

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provision for meaningful attention to the interest of the employer and to questions of efficiency. In the case before us we have a Joint Board of employers and employees and one that was specifically organized and maintained for the purpose of coping with the requirements of the Taft-Hartley Act and the need for the effective resolution of jurisdictional disputes. It is a board that takes into account factors of economy and efficiency of operation. The construction industry is typically beset by conflicts in which a group of employees and their employers (sometimes, of course, subcontractors) are likely to be aligned with each other as against another alignment of a different group of employees and their employers.

[28] We do not determine whether the rule of this decision should be retroactive to prior 10(k) determinations in cases other than the one before us. The Supreme Court has in various instances given only prospective effect to rulings that upset a previous course of decision. See Desist v. United States, 394 U.S. 244 (1969) and cases there cited. In some cases our court, in overturning a long-standing administrative construction of a statute, has held that the balance of public interest is best served by withholding completely retroactive effect to our ruling. Blair v. Freeman, 125 U.S.App. D.C. 207, 370 F.2d 229 (1966). Certainly our ruling would

Our understanding of the thrust of Federal labor policy as developed by Congress proceeds along lines congruous to those developed by the Supreme Court in *Boys Markets, Inc.* v. *Retail Clerks, supra.* There the Court reversed a ruling of but nine years standing in order to maintain the efficacy of the arbitration remedy—viewed in the large as furthered by an injunction preserving the status quo pending the arbitral process. The Court stressed the importance of mutuality—that an employer could not be held to his contract to pursue the arbitration remedy if he could not obtain effective relief (including pendente lite injunction) to enforce the union's similar obligation. Our situation is marked by technical differences but similarity in principles. As we have noted, Board abstention under § 10(k) in favor of an arbitration agreement is accompanied by injunctive relief to maintain the status quo pending the conducting of the arbitration and the enforcement of the award. And the pattern we find in the Act avoids a lack of mutuality since the employer cannot interfere with arbitration on the ground that he desires to permit the Board to conduct a proceeding and issue an order that he is not obligated to observe.

Accordingly the petition to review is granted; the petition for enforcement is denied; and the Board's order of June 27, 1968, 172 NLRB No. 77 is set aside.

So ordered.

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be applicable to any subsequent 10(k) decision, for the Board would be on notice of the infirmity. See Zuber v. Allen, 396 U.S. 168, 197 (1969). As to the applicability of our ruling to decisions previously issued by the Board, we do not clearly discern the possible shape of the problem, and therefore we defer decision on what course will best effectuate the Federal labor policy contemplated by Congress.

MACKINNON, *Circuit Judge*, dissenting: Since its amendment over twenty years ago, the decisions of the National Labor Relations Board [1] (NLRB) and

[1] United Brotherhood of Carpenters, etc., Local 581 (Ora Collard), 98 NLRB 346, 348-349 (1952); Int'l Union of Operating Engineers (Empire State Painting Co.), 99 NLRB 1481, 1484-1486 (1952); International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Pittsburgh Plate Glass Co.), 125 NLRB 1035, 1038-1039 (1959); United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, 108 NLRB 186, 197 (1954); Millwrights Local 1102, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (General Riggers and Erectors, Inc.), 127 NLRB 26, 29 (1960); Newspaper and Mail Delivers' Union (News Syndicate Co.), 141 NLRB 578, 580 (1963); International Union of Operating Engineers, Local 66 (Frank P. Badolato & Son), 135 NLRB 1392, 1395-1396 (1962); Local 173, Wood, Wire and Metal Lathers' International Union, AFL-CIO (Newark and Essex Plastering Co.), 121 NLRB 1094, 1103-1104 (1958); Bay Counties District Council of Carpenters, Inc., 115 NLRB 1757, 1766-1767 (1956); Local 450, International Union of Operating Engineers (Sline Industrial Painters), 119 NLRB 1725, 1731 (1958), enforced, 275 F.2d 408 (5th Cir. 1960); Local 825, Int'l Union of Operating Engineers (Nichols Electric), 137 NLRB 1425, 1428-1429 (1962), enforced, 326 F.2d 213 (3d Cir. 1964); Local 964, United Brotherhood of Carpenters (Carleton Bros.), 141 NLRB 1138, 1142 (1963); Local 68, Wood, Wire & Metal Lathers, etc. (Acoustics & Specialties, Inc.), 142 NLRB 1073, 1076 (1963); Local 825, Int'l Union of Operating Engineers (Schwerman Co. of Pa., Inc.), 139 NLRB 1426, 1429 (1962); Carpenters District Council of Denver Inc. (J. O. Veteto & Son), 146 NLRB 1242, 1245 (1964); Electrical Workers, Local 26, etc. (McCloskey & Co.), 147 NLRB 1498, 1501-1503 (1964); Carpenters Local Union No. 1622 (O. R. Karst), 139 NLRB 591, 594 (1962); Operative Plasterers Local No. 65 (Twin City Tile & Marble Co.), 152 NLRB 1609 (1965); Local 300, United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (D'Annunzio Bros., Inc.), 155 NLRB 836 (1965).

the federal courts[2] have assumed that the National Labor Relations Act requires both the employer and the unions charged with committing an unfair labor practice under section 8(b) (4) (D)[3] agree to be bound by an arbitration before the N.L.R.B may be

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[2] *See* New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 763 (5th Cir. 1966); N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL-CIO (Nichols Electric Co.), 326 F.2d 213, 216 (3rd Cir. 1964); Local 450, International Union of Operating Engineers, AFL-CIO (Sline Industrial Painters) v. Elliott, 256 F.2d 630, 636 (5th Cir. 1958). *See also* Carey v. Westinghouse Electric Corp., 375 U.S. 261, 264 (1963), citing Wood, Wire & Metal Lathers Union, 119 NLRB 1345, 1347 (1958).

[3] The unfair labor practice is defined by § 8(b) (4) (D) which provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting Commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> * * * *
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> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. 29 U.S.C. § 158(b) (4) (D).

divested by section 10(k)[4] of jurisdiction to hear and decide the issue.

The majority opinion here would reverse all these administrative and court decisions and hold that the NLRB has no jurisdiction to decide such disputes where the two unions invloved are members of the AFL Building and Construction Trades Department if both have agreed to be bound by the decisions of the National Joint Board for the Settlement of Jurisdictional Disputes (Joint Board)[5] established by that labor organization.

In this case the NLRB found that Plasterers Union committed an unfair labor practice under section 8(b) (4) (D), but the majority opinion would sustain the Plasterers' claim that the NLRB was without jurisdiction to hear and determine the dispute because the two unions (Plasterers and Tile Setters) had agreed upon a voluntary method of adjusting the

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[4] Section 10(k) provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. 29 U.S.C. § 160(k).

[5] This board was created pursuant to an agreement of October 17, 1949 by the Building and Construction Trades Department of the AFL, the Participating Specialty Contractors Employers' Association and the Associated General Contractors of America, Inc. *See* 53 GEO. L.J. 130 n.198 (1964).

dispute notwithstanding the fact that the employers had not agreed to be bound by such decision. The principal contention of the Plasterers, which is sustained by the majority opinion, is that the employers' consent to be bound by such decision is not required under section 10(k).

The NLRB contends the employers are parties to the dispute and since it is admitted they have not agreed to be bound by the Joint Board determination of the dispute between the two unions that the NLRB is empowered and directed to make a binding determination of the dispute that will be controlling upon all the parties. The majority opinion bases its decision upon (1) alleged legislative history and (2) a single sentence in a 1961 Supreme Court decision. Both of these grounds have a similar cast to them as both involve isolated comments addressed to describing the garden variety of jurisdictional disputes and neither were in any way addressed to the problem that is before the court here of the NLRB's power and duty to adjudicate unfair labor practices caused by jurisdictional strikes in violation of section 8(b) (4) (D). See section 10(a).

In asserting reliance on the legislative history, petitioner cites the article in 52 GEORGETOWN LAW JOURNAL 314 by counsel in this case. This article published in 1964 favored the Joint Board approach to jurisdictional disputes and it has spawned several later articles that adopt the same thesis that somehow the legislative history of section 10(k) supports the position here asserted on behalf of the Joint Board. The majority opinion adopts this argument. The feature of the "legislative history" that is relied upon to bring about this result is stated in the GEORGETOWN LAW JOURNAL article to be:

> Certainly, the literal meaning of section 10(k) does not require the employer to be a party to a settlement of a jurisdictional dispute,[6] and *the legislative history of the Act makes no mention whatsoever of employer's participation in private settlements under section 10(k)*. 52 GEO. L.J. 314, 332 (1964) (emphasis added).

In support of the italicized statement the article in a footnote cites five instances when Senators and Congressmen discussed jurisdictional disputes or strikes and did not mention employers' participation in private settlements under section 10(k). There is nothing exceptional about this and it has absolutely no bearing on the issue here. The fact that Congress did not discuss employer participation does not in any way indicate any congressional intent on the matter.

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[6] Actually, the literal meaning of § 10(k) deals only with jurisdictional strikes against an employer and does not concern itself with jurisdictional disputes between unions. So long as jurisdictional disputes are confined to unions the NLRB has no jurisdiction under § 10(k). It is only when an unfair labor practice involves an employer through a jurisdictional strike that the NLRB has any jurisdiction. *See* Justice Douglas' opinion in Carey v. Westinghouse Corp., *supra*, 375 U.S. at 263-264. Senator Taft made this same point on June 21, 1947 in a radio address. He was addressing himself to the handling of jurisdictional disputes under § 10(k) after that section had attained its present form. He said:

> The President says the bill would force unions to strike if they wish to have a jurisdictional dispute settled by the National Labor Relations Board. This is not so. All the union has to do is to file a petition under the representation section. *How could this provision increase strikes when it is not effective at all until there is already a jurisdictional strike or secondary boycott in effect?* (Emphasis added). 2 *Legislative History Labor Management Relations Act* 1947, p. 1627.

The members of Congress just did not address themselves to the point. In addition, there is a very good reason they did not address themselves to the point and that was because at the time four of the five remarks were made, section 10(k) was not in its present form. The bill originated in the House and at that stage it merely defined jurisdictional strikes and made them unlawful. Section 10(k) was not then in the bill. This treatment of jurisdictional strikes was supplanted in the Senate bill by a section 10(k) the principle provision of which empowered and authorized the NLRB to appoint an arbitrator to hear and determine such disputes. This provision for the NLRB appointment of an arbitrator was removed in the Conference Committee and section 10(k) then for the first time assumed is present character. Thus, the failure of the five members of Congress to discuss 10(k) in its present form is explained by the fact that the bill did not reach its present form until after their quoted remarks. While the 10-day provision was always a part of 10(k) from the time it emerged in the Senate bill it attracted no notice because it was always over-shadowed by the provision for the Board to appoint an arbitrator.

This explains why the members of Congress in four out of five instances cited did not even consider the issue we have here.[7]

However, Senator Morse did discuss section 10(k) after it had achieved its present form and he interpreted the provision as requiring the NLRB to decide jurisdictional disputes. Speaking on the Senate floor

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[7] *See Legislative History Labor Management Relations Act* 1947, Representative Hartley 615, Senator Morse 950, Senator Taft 1012, Senator Murray 1046, Senator Smith 1157.

on June 4, 1947 on the bill as reported by the House and Senate Conferees, Senator Morse said:

> I am especially disturbed about the amendment made in conference *which requires the Board itself*, rather than an arbitrator, *to decide these jurisdictional disputes.* I think the provision is completely unworkable. Under the provision *the Board will have to hear and decide the merits of the disputes* in the motion-picture industry and the controversy of over 50 years' standing between the teamsters and brewery workers unions, to mention only a few.[8] (Emphasis added). 2 *Legislative History of the Labor Management Relations Act*, 1947, p. 1554.

So the "legislative history" relied upon by the petitioner is not helpful and to the extent that the remarks of Senator Morse on June 5, 1947 may be considered to be in this category, they are adverse to petitioners. The truth of the matter is that the legisislative history of section 10(k) does not afford any substantial assistance to its interpretation and the weakness of the majority opinion is demonstrated by its assertion that it does.

The Supreme Court decision is *NLRB* v. *Radio and Television Broadcast Engineers Union* [*CBS*], 364 U.S. 573 (1961), and the single sentence in that opinion which the majority opinion here relies upon comments upon a clause in section 10(k), as follows:

> [T]he clause "the dispute out of which such unfair labor practice shall have arisen" can have no other meaning except a jurisdictional dispute under § 8(b) (4) (D) which is a dispute be-

[8] He did not address himself to the problem which arises under the Joint Board here. *See* note 5 *supra.*

> tween two or more groups of employes over which is entitled to do certain work for an employer. 364 U.S. at 579.

Since neither the legislative history nor this sentence in the CBS decision addressed the problem here being considered, neither furnish any support for the conclusion reached by the majority opinion. The comments quoted in the legislative history and in *CBS* are correct as far as they go, but they do not touch the issue here. They are merely comments taken out of context and misapplied.

Another feature of the majority opinion that obscures the issue is its overemphasis on the "jurisdictional dispute" here involved and its underemphasis on the fact that the dispute had ripened into a jurisdictional strike against an employer and that based upon such conduct, unfair labor practice charges had been filed with the NLRB.

No person needs any support for the proposition that the most ordinary union jurisdictional dispute primarily involves the unions concerned but that conclusion does not support the finding that the employer is not a very vital party to a jurisdictional strike arising out of that underlying dispute and which subsequently becomes the subject of an unfair labor practice charge. The unions by their actions have made him a party to their dispute and the statute recognizes this fact. Also, the fact that the Joint Board has employer groups in its structure, indicates that employers do have a direct interest in their decisions.

The words "such dispute" in section 10(k) *refer to the dispute out of which the unfair labor practice arose* and the statute provides that is the jurisdictional *strike* in which the striking union attempts to force the employer to assign particular work to em-

ployees in its union. There is no question that the employer is a party to that dispute. In fact, an employer is a necessary party to any dispute involving an unfair labor practice under section 8(b) (4) (D) by its very definition. Clearly the unfair labor practice arises out of the *strike*. More remotely the jurisdictional strike in many cases arises out of the jurisdictional *dispute*[9] but no unfair labor practice charge under section 8(b) (4) (D) ever arose solely out of a jurisdictional dispute between two unions. It requires "a strike" that involves an employer as one party.

Moreover, there are several interesting references to the interests of employers in jurisdictional disputes. The article in 52 GEORGETOWN LAW JOURNAL 314 on Jurisdictional Disputes cited in the majority opinion recognizes at pp. 320-21 that ". . . an employer is not necessarily a neutral party unconcerned with which group performs the work . . . ." Also, in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964), Justice Douglas discusses jurisdictional disputes and points out several ways in which they may involve employers:

> We have here a so-called "jurisdictional" dispute involving two unions *and* the employer. But the term "jurisdictional" is not a word of a single meaning. In the setting of the present case this "jurisdictional" dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees do-

[9] This more remote dispute was what Justice Black was referring to in the *CBS* case, *supra* at 579.

> ing particular work. If this controversy is considered to be the former, *the National Labor Relations Act* (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*) *does not purport to cover all phases and stages of it.* While § 8(b) (4) (D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, *the Act does not deal with the controversy anterior to a strike nor provides any machinery for resolving such a dispute absent a strike.*
>
> * * * *
>
> The Act and its remedies for "jurisdictional" controversies of that nature come into play only by a strike or a threat of a strike. *Such conduct gives the Board authority under § 10(k) to resolve the dispute.* 375 U.S. at 263-264. (Emphasis added).

I find Justice Douglas' approach to this portion of the Act to be more reasonable than the finespun theory advanced in the majority opinion. After all, we are here faced with what all admit is an unfair labor practice that has been committed in violation of section 8(b) (4) (D). In such circumstances, section 10(k) should be read in conjunction with section 10(a) which provides:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise* . . . . (Emphasis added). 29 U.S.C. § 160(a).

In carrying out the various duties imposed upon it by Congress the NLRB has followed a policy for twenty years which favors and encourages the unions to settle their own differences by themselves. Even when a union starts a jurisdictional strike in violation of section 8(b) (4) (D), the NLRB will quash the proceedings under 10(k) if either union renounces any claim to the work.[10] It is only when the dispute is protracted that the NLRB carries out the regular hearing as directed by section 10(k).[11] This is a recognition of the changed status of the dispute which occurs when one or both unions enlarge the dispute between themselves to include the employer by engaging in a strike against that employer in an attempt to obtain an advantage over their rival union.[12]

Such procedure by the NLRB must be considered to be a sound interpretation and application of the powers conferred upon it by the Act. The sound discretion they exercise in such matters also finds support in that provision of section 10(k) which requires the parties to

> ". . . submit to the Board *satisfactory evidence* that they have adjusted, or agreed upon methods for the voluntary *adjustment* of, the dispute. . . ." (Emphasis added).

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[10] *See* Local 1905, Carpet, Linoleum & Soft Tile Layers (Southwestern Floor Co.), 143 NLRB 251, 255-256 n.7 (1963).

[11] This is the representation in the NLRB brief as to agency policy.

[12] In New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 767 (5th Cir. 1966), the court remarked:

> When the Union struck to enforce the work assignment it removed the controversy from the field of private contractual rights into the higher ambit of public rights.

It also made the employer a party to the dispute.

"Satisfactory evidence . . . [of] adjustment" to whom? Obviously to the NLRB. This vests the NLRB with discretion in the matter. This discretion is weighed against the overriding duty imposed on the NLRB to prevent any unfair labor practice and to exercise that power unaffected "by any other means of adjustment." § 10(a). This places a heavy responsibility upon the NLRB in a section 8(b) (4) (D) proceeding to determine that the settlement procedure is going to be effective to adjust the unfair labor practice (not just the jurisdictional dispute) before it discusses the charge. I thus find the majority opinion that strikes at the heart of this procedure to be an unreasonable interpretation of the Act and find much more reasonable the 20-year administrative interpretation that has been placed by the Board upon these sections of the Act.

The Board's interpretation of its duties in these jurisdictional disputes has been regularly reported to Congress [13] and Congress has left section 10(k) unchanged even though it has made extensive revisions of the Act since 1947. It amended both sections (j) and (*l*) as well as 8(b) (4) (D) in 1959. Under such circumstances Congress is deemed to have accepted the construction placed on section 10(k) by the Board [14] and under such circumstances it is well settled

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[13] *See, e.g.*, Twentieth Annual Report of the National Labor Relations Board (G.P.O., 1956), p. 118; Twenty-first Annual Report of the National Labor Relations Board (G.P.O., 1957), p. 119; Twenty-third Annual Report of the National Labor Relations Board (G.P.O., 1959), pp. 101-102.

[14] Labor Board v. Gullett Gin Co., 340 U.S. 361, 366 (1951). Such interpretation does not assign conclusive weight to congressional inaction. (*See* Boys Markets, Inc. v. Retail Clerk's Union, —— U.S. —— (June 1, 1970), cited by the majority opinion at page 21). It merely points to the failure or refusal of

that the contemporaneous construction of the statute by the agency charged with its administration and enforcement should be sustained.[15] I accordingly dissent from the majority opinion that would overturn long-standing Board practices.

Congress to amend this section when it was amending subsections on both sides of it as one factor in conjunction with the contemporaneous construction of the Act by the NLRB over 23 years, the provisions of the Act itself including section 10(a) and Mr. Justice Douglas' opinion in Carey v. Westinghouse Corp., *supra*, wherein he points out that "there is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award," as pointing to a conclusion that the Act is not to be construed in the manner the majority opinion states. These are all indicia of congressional intent and that is the principle here relied upon; not *stare decisis* as in Boys Markets, Inc.

[15] Udall v. Tallman, 380 U.S. 1,. 16-17 (1965); F.T.C. v. Mandel Bros., Inc., 359 U.S. 385, 391 (1959); NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956); Commissioner v. Estate of Sternberger, 348 U.S. 187, 199 (1955); United States v. Public Utilities Commission of California, 345 U.S. 295, 314-315 (1953); Union Mfg. Co. v. NLRB, 95 U.S.App. D.C. 252, 221 F.2d 532, 536, *cert. denied*, 349 U.S. 921 (1955), and cases there cited; West Texas Utilities Co. v. NLRB, 87 U.S.App.D.C. 179, 181, 184 F.2d 233, 235 (1950), *cert. denied*, 341 U.S. 939 (1951).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1969

No. 22,073

(United States Court of Appeals for the District of Columbia Circuit Filed Jun 30, 1970 Nathan J. Paulson, Clerk)

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., AND LOCAL UNION 20 BRICKLAYERS ETC., LOCAL UNION 108 INT'L. ASSOC. OF MARBLE ETC. POLISHERS, ET AL., INTERVENORS

On Petition to Review and Cross-Petition to Enforce an Order of the National Labor Relations Board

Before: McGowan, Leventhal, and MacKinnon, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the petition for review is hereby granted; the petition to enforce is denied; and the order of the National Labor Relations Board on review herein (172 NLRB No. 77, June 27, 1968) is hereby set aside.

Per Curiam

For the Court:

NATHAN J. PAULSON, Clerk

By:

Hugh E. Kline
Chief Deputy Clerk

Dated: June 30, 1970.

Opinion per Circuit Judge Leventhal.
Separate dissenting opinion by Circuit Judge MacKinnon.

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Dorothy E. Long, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

No. 22,073

(United States Court of Appeals for the District of Columbia Circuit Filed Oct. 1, 1970
Nathan J. Paulson, Clerk)

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., AND LOCAL UNION 20 BRICKLAYERS ETC., LOCAL UNION 108 INT'L. ASSOC. OF MARBLE ETC. POLISHERS, ET AL., INTERVENORS

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges; in Chambers.

ORDER

On consideration of respondent's petition for rehearing and suggestion for rehearing *en banc* and of intervenor's petition for rehearing and suggestion for rehearing *en banc*, and it appearing that there is not a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court that the aforesaid petitions for rehearing and suggestions for rehearing *en banc* are denied.

Per Curiam

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Elisabeth E. Namuth, Deputy Clerk

Circuit Judge Wright did not participate in the foregoing order.

Circuit Judge MacKinnon would grant the respondent's and intervenor's suggestions for rehearing *en banc* for the reasons set forth in his dissenting opinion.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 23-CD-133

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

SOUTHWESTERN CONSTRUCTION COMPANY

Case No. 23-CD-137

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

MARTINI TILE AND TERRAZZO COMPANY [1]

DECISION AND ORDER

Upon charges filed on January 30, 1967, and February 7, 1967, by Southwestern Construction Com-

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[1] On October 10, 1967, Associate Chief Trial Examiner Charles W. Schneider granted a motion for intervention to the following organizations: Bricklayers, Masons and Plasterers International Union of America; International Association of Marble, Slate, and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters' Helpers, and Marble Mosaic and Terrazzo Workers' Helpers; and Tile Contractors' Association of America, Incorporated.

pany, herein called Southwestern, and on March 17, 1967, by Martini Tile and Terrazzo Company, herein called Martini, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 23, issued a complaint on September 14, 1967 against Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b) (4) (i) and (ii) (D) of the National Labor Relations Act, as amended. In substance, the complaint alleges that the Respondent violated the Act by engaging in picketing and other activities at the M. D. Anderson Library project, Houston, Texas, and at the Rainbo Baking Company, Houston, Texas, with an object of forcing or requiring Southwestern and/or its subcontractor, Texas State Tile and Terrazzo, Inc., herein called Texas Tile, and Martini, to assign the work of applying to walls a coat of Portland cement mortar upon which tile was to be installed to employees represented by the Respondent, rather than to employees represented by Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO, herein called the Tile Setters. The Respondent filed an answer admitting certain allegations of the complaint and denying certain other allegations.

On October 30, 1967, at a hearing held pursuant to the Complaint and Notice of Hearing, the parties agreed to submit this proceeding directly to the Board for the issuance of findings of fact, conclusions of law, and a Decision and Order. It was agreed that the entire record in this case shall consist of: The Decision and Determination of Disputes, the tran-

script of testimony, exhibits, and formal papers in the prior 10(k) proceeding,[2] and the transcript, exhibits and formal papers in the present proceeding. The parties waived a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision. On April 22, 1968 the General Counsel filed a Motion to Transfer Case to the Board. On April 24, 1968, the Board granted the motion.[3]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Briefs were filed by the Respondents, and jointly by Texas Tile, Martini, the Tile Setters and the Intervenors, which have been duly considered.

Upon the entire record in these cases, the Board makes the following:

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[2] On August 22, 1967, in a proceeding pursuant to Section 10(k), the Board issued its Decision and Determination of Disputes (167 NLRB No. 23), in which the Board concluded that employees of Texas Tile and Martini represented by the Tile Setters were entitled to perform the work in dispute. At no time since the issuance of the Board's Decision and Determination of Disputes has the Respondent given written notification to the Regional Director for Region 23 that it would refrain from forcing or requiring Texas Tile and/or Martini, by means proscribed in Section 8(b)(4)(D), to assign the work in dispute to plasterers rather than tile setters.

[3] Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

Findings of Fact

1. *The businesses of the Employers.*

The parties stipulated that:

A. Texas Tile, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing Texas Tile purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Texas Tile at points within the State of Texas.

B. Martini, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing Martini purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Martini at points within the State of Texas.

We find that Texas Tile and Martini are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. *The labor organizations involved.*

The parties stipulated, and we find, that the Plasterers and the Tile Setters are labor organizations within the meaning of Section 2(5) of the Act.

3. *The Unfair Labor Practices.*

A. *The M. D. Anderson Library Job*

In 1965, Southwestern, a general contractor, entered into a contract with the University of Houston

to construct an addition to the M. D. Anderson Library. Southwestern let a subcontract for the tile and terrazzo work to Texas Tile, which commenced work in August 1966. Texas Tile has a collective-bargaining agreement with the Tile Setters and assigned the work to employees represented by the Tile Setters. At the outset of work in August 1966, the Tile Setters began to apply a coat of Portland cement mortar to receive tile. The Respondent claimed the work. The matter was sent to the National Joint Board for the Settlement of Jurisdictional Disputes. On November 10, 1966, the Joint Board rendered a decision awarding the disputed work to the Respondent. Texas Tile was not bound by the Joint Board decision. The record shows, and we find, that thereafter, the Respondent, through its representative, George Gongshore, made several attempts to obtain the work in question but Texas Tile and the Tile Setters refused to accede to its demands. On January 24, 1967, the Respondent established a picket at the jobsite. The picket sign read as follows:

> Plasterers Local 79 protest the refusal of Texas State Tile and Terrazzo to comply with the National Joint Board. Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or concerted refusal to work.

In fact, all crafts working on the job honored the picket, causing a complete work stoppage. The picket was removed after an injunction was granted by the United States District Court for the Southern District of Texas, Houston Division, on February 20, 1967. We further find that the Respondent engaged in such picketing with an object of forcing or requiring Texas Tile to change the assignment of the dis-

puted work from its own employees, who were members of or represented by the Tile Setters, to employees who were members of or represented by the Respondent.

B. *The Rainbo Job.*

Martini has a contract with the Rainbo Baking Company in Houston, Texas, to furnish labor and materials for the installation of ceramic tile. Martini delivered its materials to the jobsite on or about March 14, 1967, and began work the next day. Martini has a collective-bargaining agreement with the Tile Setters and assigned the work in dispute to employees represented by the Tile Setters.

On the morning of March 17, 1967, the Respondent established a picket line at the jobsite. The picket sign read as follows:

> Plasterers Local No. 79, protests substandard conditions Martini Tile Co., Inc., Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work.

Shortly after the establishment of the picket, officials of Rainbo requested Martini to remove its employees from the premises. Martini complied and a work stoppage ensued. Thereafter, the Respondent removed the picket and picketing was not resumed although Martini returned and continued work on the job. Respondent has stipulated, and we find, that the Respondent engaged in such picketing with an object of forcing or requiring Martini to change the assignment of the disputed work from its own employees, who were members of or represented by the Tile Setters, to employees who were members of or represnted by the Respondent.

C. *Respondent's Contentions*

The Respondent's defense herein, as argued in its brief, is in the nature of a request for reconsideration of the Board's Decision and Determination of Disputes issued in the 10(k) proceeding. It argues, *inter alia*, that the word "parties" as used in Section 10(k) does not mean the employer and the two unions or groups of employees claiming the work in dispute need agree upon a method for the voluntary adjustment of the dispute for the Board to quash the Notice of Hearing, but only that the two Unions or groups of employees need agree upon such a method of adjustment, and that since Respondent and the Tile Setters are both subject to the Joint Board's jurisdiction, the Notice of Hearing should have been quashed. We reiterate, however, our consistent interpretation of Section 10(k) that the employer controlling the work assignment as well as the rival unions involved comprise the "parties to such dispute," and all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that Section.[4] Moreover, we note that the Board's longstanding interpretation of this aspect of Section 10(k) was neither questioned nor disturbed when the National Labor Relations Act was most recently amended by Congress in 1959. Accordingly, we find no merit in this contention of the Respondent. We have examined the re-

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[4] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 428, AFL (Philadelphia Association)*, 108 NLRB 186, 195-8, Local 450, *and Joiners of America, Local 1622 (O. R. Karst)*, 139 NLRB 591. See also our Decision in the prior 10(k) proceeding, 167 NLRB No. 23, and the cases cited in footnote No. 4 therein.

maining arguments in support of the Respondent's position, and also find nothing therein which was not previously considered by the Board. We perceive no reason for disturbing the prior Decision and Determination of Disputes.[5]

On the basis of the foregoing facts, and the entire record in these cases, we find that the Respondent's picketing of the M. D. Anderson and Rainbo projects as described above was for a proscribed object and in violation of Section 8(b) (4) (i) and (ii) (D).

4. *The Effect of the Unfair Labor Practices Upon Commerce.*

The activities of the Respondent set forth in section 3, above, occurring in connection with the operations of the Employers set forth in section 1, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

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[5] By motions made on February 21, 1968, "To Correct Record on Material Omissions," and on May 22, 1968, "To Correct 10(k) Record on Material Misstatement", Texas Tile, Martini and the Tile Setters seek to supplement the 10(k) record with various evidentiary matter that is in the nature of new evidence, which is not shown to be newly discovered and previously unavailable. It is clearly not a "correction" of the 10(k) record, or a supplying of evidence to fill an obvious omission in the record. The motions are hereby denied. Previously, on January 17, 1968, the Board denied a "Motion to Re-open 10(k) Record on Issuance of Nationwide Order" filed by the Tile Setters and the two employers, on the ground, *inter alia*, that the assertion that the evidence offered therein was newly discovered and previously unavailable was unsupported.

5. *The Remedy.*

Having found that the Respondent violated Section 8(b) (4) (i) and (ii) (D) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Conclusions of Law

1. Texas Tile and Martini are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent and the Tile Setters are labor organizations within the meaning of Section 2(5) of the Act.

3. By its picketing at the M. D. Anderson Library job, Houston, Texas, with an object of forcing or requiring Texas Tile to assign certain work (applying to walls a coat of Portland cement mortar upon which tile was to be installed) to employees represented by the Respondent rather than to employees represented by the Tile Setters, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) and (ii) (D) of the Act.

4. By its picketing of the Rainbo Baking Company job, Houston, Texas, with an object of forcing or requiring Martini to assign certain work (applying to walls a coat of Portland cement mortar upon which tile was to be installed) to employees represented by the Respondent rather than to employees represented by the Tile Setters, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) and (ii) (D) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas its officers, agents, and representatives shall:

1. Cease and desist from engaging in, or inducing or encouraging individuals employed by Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any materials or to perform any services; and from threatening, coercing, or restraining the aforesaid persons, where an object in either case is to force or require Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, to assign the work of applying to walls a coat of Portland cement mortar upon which tile is to be installed at the M. D. Anderson Library and Rainbo jobs, to employees represented by the Respondent rather than to employees represented by Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO.

2. Take the following affirmative action the Board finds will effectuate the policies of the Act:

(a) Post at its business offices, meeting halls and all other places where notices to employees are customarily posted, in Houston, Texas, copies of the at-

tached notice marked "Appendix".* Copies of said notice, on forms provided by the Regional Director for Region 23, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail copies of said notice to the Regional Director for Region 23 for posting by Texas State Tile and Terrazzo, Inc., and Martini Tile and Terrazzo Company, the Companies willing, at locations where notices to its employees are customarily posted.

(c) Notify the Regional Director for Region 23, in writing, within 10 days from the date of this order, what steps have been taken to comply herewith.

Dated, Washington, D. C.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

* In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decision of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL OUR MEMBERS PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage individuals employed by Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, or any other person engaged in commerce, or in an industry affecting commerce, to engage in, a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any materials, or to perform any services; or threaten, coerce, or restrain the aforesaid persons, where an object in either case is to force or require Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, to assign the work of applying to walls a coat of Portland cement mortar upon which tile is to be installed, at the M. D. Anderson Library job or at the Rainbo Baking Company, Houston, Texas, to employees represented by this Union, rather than to employees represented by Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO.

PLASTERERS LOCAL UNION NO. 79,
OPERATIVE PLASTERERS AND CEMENT
MASONS INTERNATIONAL ASSOCIATION
OF HOUSTON, TEXAS
(Labor Organization)

Dated..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas 77002, (Tel. No. 228-4296), if they have any questions concerning this notice or compliance with its provisions.

APPENDIX D

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 23-CD-133

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

SOUTHWESTERN CONSTRUCTION COMPANY

Case No. 23-CD-137

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

MARTINI TILE AND TERRAZZO COMPANY

DECISION AND DETERMINATION OF DISPUTES

This is a consolidated proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Southwestern Construction Company, herein called Southwestern, and Martini Tile and Terrazzo Company, herein called Martini, alleging violations of Section 8(b)(4)(D) of the Act by Plasterers Local Union No. 79, Operative

Plasterers and Cement Masons International Association of Houston, Texas, herein called the Plasterers. Pursuant to notice, a hearing was held on April 6, 7, 10, 11, 12, 13, and 14, 1967, before Donald H. Hicks, Hearing Officer. Southwestern, Martini, the Plasterers, Texas State Tile and Terrazzo, Inc., herein called Texas Tile, and Tile, Terrazzo and Marble Setters Local Union No. 20, herein called the Tile Setters, appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The rulings of the Hearing Officer made at the hearing are free from prejudicial error and are hereby affirmed. All parties filed briefs which have been duly considered.

Upon the entire record in these cases, the Board makes the following findings:

1. *The businesses of the Employers.*

The parties stipulated that:

A. Texas Tile, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to

[1] The Plasterers and the Tile Setters are parties to the dispute. While Southwestern is the Charging Party in Case No. 23-CD-133, Texas Tile intervened as the employer that assigned the work in that case to the Tile Setters. It participated jointly with Martini and the Tile Setters.

the hearing, Texas Tile purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Texas Tile at points within the State of Texas.

B. Martini, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing, Martini purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Martini at points within the State of Texas.

We find that Texas Tile and Martini are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. *The labor organizations involved.*

The parties stipulated, and we find, that the Plasterers and the Tile Setters are labor organizations within the meaning of Section 2(5) of the Act.

3. *The dispute.*

A. The work in dispute is the application to walls of a coat of Portland cement mortar upon which tile was to be installed.

B. *The basic facts.*

Case No. 23-CD-133

In 1965, Southwestern, a general contractor, entered into a contract with the University of Houston to construct an addition to the M. D. Anderson Library. Southwestern let a subcontract for the tile

and terrazzo work to Texas Tile, which commenced work in August 1966. Texas Tile has a collective-bargaining agreement with the Tile Setters and assigned the work to employees represented by the Tile Setters. At the outset of work in August 1966, the Tile Setters began to apply a coat of Portland cement mortar to receive tile. The Plasterers claimed the work. The matter was sent to the National Joint Board for the Settlement of Jurisdictional Disputes. On November 10, 1966, the Joint Board found that "the work in dispute is governed by the agreement of August 22, 1917, and shall be assigned to Plasterers, except that any coat to be applied wet the same day under tile shall be placed by the Tile Setters. In the thin-set or adhesive method of applying tile to walls and ceilings, the Plasterers shall apply the first and second coats of mortar, that is the scratch coat and plumb coat. The Plasterers shall plumb, rod and square all walls, rod and level all ceilings and the Tile Setters shall apply the final setting bed for the Tile." Texas Tile was not bound by the Joint Board decision.

Thereafter, the Plasterers made several attempts to obtain the work in question but the Tile Setters refused to accede to their demands. On January 24, 1967, the Plasterers established a picket at the jobsite. The picket sign read as follows: "Plasterers Local 79 protest the refusal of Texas State Tile and Terrazzo to comply with National Joint Board. Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or concerted refusal to work." All crafts working on the job honored the picket. The picket was removed after an injunction was granted by the United States District Court for the Southern District of Texas, Houston Division, on February 20,

1967. The work in dispute was completed by the Tile Setters.

The immediate work involved at the time of the picketing was the application of a second coat of Portland cement mortar (in the stairwell area) upon which quarry tile was to be installed. The Plasterers had applied a scratch coat of plaster (agreed to be Plasterers' work). Then the disputed second coat (called the ""brown coat" by the Plasterers or the "float coat" or "setting bed" by the Tile Setters) was applied by the Tile Setters. Both unions claim this latter coat as their own work.

Case No. 23-CD-137

Martini has a contract with the Rainbo Baking Company in Houston, Texas, to furnish labor and materials for the installation of ceramic tile. Martini delivered its materials to the jobsite on or about March 14, 1967, and began work the next day. Martini has a collective-bargaining agreement with the Tile Setters and assigned the work in dispute to employees represented by the Tile Setters.

On the morning of March 17, 1967, the Plasterers established a picket line at the jobsite. The picket sign read as follows: "Plasterers Local No. 79, protests substandard conditions Martini Tile Co., Inc., Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work." Shortly after the establishment of the picket, officials of Rainbo requested Martini to remove its employees from the premises. Martini complied. The Plasterers removed the picket and picketing was not resumed although Martini subsequently returned and completed the job.

The work in dispute is the application of a coat of Portland cement mortar applied directly to metal lathe which was laid over painted brick. The Plasterers contends that this is the "brown coat", which is plasterers' work, while the Tile Setters claims that the coat in question is the "float coat" or "setting bed" which is tile setters' work. The dispute at Rainbo was not submitted to the Joint Board for a decision. Martini filed the charge.

C. *Contentions of the parties.*

The Plasterers admits seeking and demanding, through its representative, George Longshore, assignment of the work in dispute in Case No. 23-CD-133 at a series of meetings with representatives of the Tile Setters, Texas Tile, and Southwestern, but contends it did not violate Section 8(b) (4) (D), as there were no threats to force a change in the assignment of the work in question, and the picket line was established only to protest Texas Tile's refusal to comply with the Joint Board's decision. In any event, it argues, it is entitled to the work on the basis of the skill, relative efficiency, and economy and quality of plasterers' work, area practice, the award made by the Joint Board in the instant case, and an agreement made between the Plasterers' and Tile Setters' International Unions. It argues that plasterers have always been entitled to the last coat of mortar which is plumbed, rodded, and squared to receive tile. It further contends that the recent introduction of dry set mortars has eliminated the tile setters' traditional setting bed in the one coat and thin set methods, and that the last mortar coat before the application of the tile under these new methods can be called the setting bed only if tile is applied while the coat is plastic or wet; a coat of mortar that is allowed to dry is work

properly assigned to plasterers. If the tile is to be applied while this last coat of mortar is still wet or plastic, it does not claim the application of that coat, in the interest of efficiency and economy, since it is serving as a combined conventional setting bed and plumb coat.

The Tile Setters contends [2] that it is entitled to the work in dispute on the basis of the skill, relative efficiency, and economy and quality of tile setters' work; the employer, area, and industry practice; and its contracts with Texas Tile and Martini which explicitly assign the designated work to it. It argues further that it is always entitled to the work of applying the last coat of mortar, which is plumbed, rodded, and squared to receive tile, whether or not that coat is allowed to dry before tile is applied. The Tile Setters admits that it is bound by Joint Board procedures, but contends that the Joint Board award of November 10, 1966, in effect awards the work to it, not to the Plasters. It points out that the award states that the Plasterers is entitled to the work in dispute on the basis of the original (1917) Green Book agreement between the parties, and that that agreement dealt with the conventional or three coat method of plastering and assigned plasterers the work of preparing ceilings and walls for the Tile Setters setting bed. It urges that the advent of dry set mortars and new construction techniques has eliminated work formerly within the jurisdiction of plasterers under the conventional method, and when either the one coat (or float coat) method or the thin set method are employed, the last coat applied *is* the "setting bed", which even the Joint Board recognizes is the tile setters' work.

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[2] Texas Tile and Martini join in the Tile Setters' contentions.

4. *Applicability of the Statute.*

The charges herein allege violations of Section 8(b) (4) (D) of the Act. The record shows, and the Plasterers does not deny, that between August 1966 and January 24, 1967, its representative, George Longshore, sought and demanded from Southwestern and Texas Tile the assignment of plasterers rather than tile setters to the work in dispute in Case No. 27-CD-133, and that on January 24, 1967, a picket was established at the jobsite which caused a work stoppage by all crafts. In Case No. 23-CD-137, the Plasterers concedes, and the record shows, that it established a picket at Rainbo Baking Company, and urged Martini to assign the application of the coat of Portland cement mortar in dispute to plasterers rather than tile setters, and that a temporary work stoppage occurred as a result of the posting of the picket.

We find there is reasonable cause to believe that violations of Section 8(b) (4) (D) have occurred, and that the dispute is properly before the Board for determination under Section 10(k) of the Act.[3]

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[3] The Plasterers contends that, as the parties had agreed upon a voluntary method of adjustment of the dispute, the notice of hearing should be quashed. It argues that Section 10(k) requires only that the unions or groups of employees claiming disputed work agree upon a method of adjustment. We find this contention without merit. The Board has consistently held that the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute. *Local 450 International Union of Operating Engineers (Painting and Decorating Contractors of America, Houston Chapter etc.)*, 119 NLRB 1725; *United Brotherhood of Carpenters and Joiners of America, Local 1622 (O. R. Karst)*, 139 NLRB 591.

5. *The merits of the dispute.*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to all relevant factors. The following factors are asserted in support of the claims of the parties herein:

A. *Collective-bargaining agreements.*

Texas Tile and Martini have delegated their bargaining authority to the Tile Contractors Association of America, Inc., and to the Tile, Marble and Terrazzo Contractors of Houston, Texas. The Tile Contractors Association of America, Inc. has a collective-bargaining agreement with the Tile Layers International Union which specifically covers work of the type in dispute. The agreement in pertinent part defines tile layers work covered as: "The application of a coat or coats of mortar, prepared to proper tolerance to receive tile on floors, walls and ceiling regardless of whether the mortar coat is wet or dry at the time the tile is applied to it." Texas Tile and Martini, as members of the Tile, Marble, and Terrazzo Contractors of Houston, Texas, are also parties to a collective-bargaining agreement pertaining to local conditions with Tile Setters Union No. 20 which incorporates the above-quoted work coverage provision. Neither Texas Tile nor Martini has any contract with the Plasterers. Texas Tile does not employ plasterers. A representative of Martini testified that on occasion in the past it has hired plasterers to perform work of the type in dispute, but never without direct supervision of a tile setter. There have been no Board certifications bearing on the work in dispute.

B. *Employer, area, and industry practice.*

The record establishes that, with rare exception, Texas Tile and Martini use tile setters to perform the disputed work. Substantial testimony was offered into the record by both the Plasterers and Tile Setters setting out specific construction projects in the area on which their respective crafts performed the work in dispute. Evidence as to industry practice was inconclusive. Though area practice by weight of numbers favors the claim of the Plasterers, in our view this factor is outweighed by other factors favoring the claim of the Tile Setters. Thus, the assignments here of the disputed work to tile setters accords with the practice of the Employers, and is not inconsistent with area or industry practice.

C. *Relative skills and efficiency of operation.*

The Tile Setters contends that tile setters are more skilled and more efficient than plasterers in applying a backup coat which is plumbed, rodded, and squared to receive tile, because only a tile setter knows exactly how to prepare a wall to the closest possible tolerance to receive tile. It also contends, as do Texas Tile and Martini, that it is more efficient, especially where only one coat of mortar is to be applied (as on the Rainbo project), to use the same craft for both the mortar work and the tile laying. The Plasterers contends, however, and the record supports its contention, that plasterers are trained to work to as close tolerance as do tile setters. It contends further that plasterers can work faster because they do plastering full-time rather than part-time, and that it is more economical to use plasterers.

The Board is satisfied from the entire record that neither craft can claim superior skill with regard to

the application of the mortar bed. Although it appears to be a necessity to use the same craft for both the last mortar coat and the tile laying if the tile is to be set while the last coat is wet, it further appears that where the last coat is allowed to dry before the application of the tile, as was the situation in both cases here, using one craft or two is equally efficient.

Texas Tile's and Martini's assignments, therefore, were not inconsistent with either the relative skills involved, or with efficiency of operation.

D. *Other agreements.*

On August 22, 1917, the Plasterers and the Tile Setters entered into an agreement pertaining to the preparing or plastering of walls and ceilings which are to receive tile in the conventional or three coat method. This agreement provided that ". . . plasterers . . . shall prepare or plaster all walls which are to receive tile. They shall plumb, rod and square all walls and scratch same so as to guarantee adhesion of the final coat which shall be put on by the Tilelayer to act as a bed for his tile." A 1924 award entered in evidence spelled out the division of work in substantially the same terms.

E. *Action of the Joint Board.*

Both the Plasterers and the Tile Setters agree that they are bound by the Joint Board. The Plasterers urges that in Case No. 23-CD-133 the Joint Board awarded the work to them in its decision of November 10, 1966, and its clarification of March 15, 1967. The Tile Setters argues, as seen hereinabove, that the award favored tile setters and not plasterers. Inasmuch as Texas Tile had not agreed to be bound by any decision of the Joint Board, the decision by that

body with respect to the M. D. Anderson project is merely one of the factors which we must consider in assigning the disputed work.[4] In Case No. 23-CD-137, there was no Joint Board award.

In view of all the circumstances, including its ambiguous nature, and upon the entire record, the Board is of the opinion that the Joint Board award abovementioned should not be accorded controlling weight.

F. *Conclusions as to the merits of the dispute.*

As the Board stated in the *J. A. Jones* case,[5] it will, in conformity with the Supreme Court's *CBS*[6] decision, determine in each case presented for resolution under Section 10(k) of the Act, the appropriate assignment of disputed work only after taking into account and balancing all relevant factors.

Having considered all pertinent factors, we conclude that employees represented by the Tile Setters are entitled to perform the work in dispute. Tile setters are at least as skilled in the performance of the work as plasterers, and both Texas Tile and Martini, which assigned them to the work, have been satisfied with both the quality of their work and the cost of employing them. Moreover, the instant assignments of the disputed work to tile setters are consistent with the explicit provisions of the collective-bargaining

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[4] *Local 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carleton Brothers Company)*, 141 NLRB 1138; *United Brotherhood of Carpenters and Joiners of America, Local No. 515 (J. O. Veteto & Son)*, 148 NLRB 351.

[5] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402, 1410-11.

[6] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union Local 1212 (Columbia Broadcasting System)*, 364 U.S. 573.

agreement between the Tile Setters and Texas Tile and Martini, are consistent with the past practice of the Employers, and are not inconsistent with area or industry practice. We conclude that the Employer's assignment of the work to the tile setters should not be disturbed. We shall, accordingly, determine the existing jurisdictional dispute by deciding that tile setters, rather than plasterers, are entitled to the work in dispute. In making this determination, we are assigning the disputed work to the employees of Texas Tile and Martini, who are represented by the Tile Setters, but not to that Union or its members.

G. *Scope of the determination.*

The work which gave rise to the disputes has already been completed. The Tile Setters requests an award which would cover the whole United States or, in the alternative, an order covering the geographic area in which the Employers operate. The record will not support a finding, necessary for the granting of a broad order, that the disputes promise to recur between the parties. Our present determination, therefore, is limited to the particular projects at which this instant dispute arose.

Determination of Disputes

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following determination of the disputes.

1. Tile layers employed by Texas State Tile and Terrazzo, Inc., and Martini Tile and Terrazzo Company, who are represented by Tile, Terrazzo and Marble Setters Local Union No. 20, are entitled to

perform the work (at the M. D. Anderson Library, University of Houston, and the Rainbo Baking Company, Houston, Texas, respectively) of applying the one coat or float coat of Portland cement mortar as backup material to receive tile.

2. Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, is not entitled, by means proscribed by Section 8(b) (4) (D) of the Act, to force or require Texas State Tile and Terrazzo, Inc., and/or Martini Tile and Terrazzo Company, to assign the above work to plasterers.

3. Within 10 days from the date of this Decision and Determination of Disputes, Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, shall notify the Regional Director for Region 23, in writing, whether it will or will not refrain from forcing requiring Texas State Tile and Terrazzo, Inc., and/or Martini Tile and Terrazzo Company, by means proscribed by Section 8(b) (4) (D), to assign the work in dispute to plasterers rather than tile setters.

Dated, Washington, D. C.

Aug. 22, 1967

John H. Fanning, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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PETITION FOR A WRIT OF CERTIORARI

LIBRARY
SUPREME COURT, U. S.

No. 1231

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-65

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ———

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Texas State Tile and Terrazzo Co., Inc., Martini Tile and Terrazzo Co., and the Tile Contractors Association of America, Inc., intervenors in the proceedings in the court below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit denying enforcement of an order of the National Labor Relations Board in favor of the petitioners herein.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 21-63)[1] is not officially reported as yet. The NLRB's Deci-

[1] References to "App." are to the Appendixes to the petition of the National Labor Relations Board in No. 1184, filed De-

sion and Order (App. C, pp. 68-80) is reported at 172 NLRB No. 77. The underlying Decision and Determination of Dispute (App. D, pp. 81-94) of the NLRB is reported at 167 NLRB 185.

JURISDICTION

The judgment of the court of appeals (App. B, pp. 64-65) was entered on June 30, 1970. On October 1, 1970, the court of appeals denied timely petitions for rehearing *en banc* filed by petitioners and the NLRB (App. B, pp. 66-67). On December 23, 1970, Chief Justice Burger extended until January 13, 1971, the time within which petitioners' could file their petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 10(k) of the National Labor Relations Act, after a union has taken coercive action to protest an employer's assignment of work to one group of employees rather than another, the NLRB is divested of power to determine the underlying jurisdictional dispute whenever the competing unions have agreed among themselves to be bound by a voluntary method for the adjustment of the dispute although the employer has not consented to be bound by that adjustment.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

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cember 30, 1970, in this same case. These appendixes contain, pursuant to Rule 23(i), copies of all court and administrative opinions in the judgment sought to be reviewed. Pursuant to permission granted by the Office of the Clerk, these opinions are not attached hereto since they have been separately presented.

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class, rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * *

Section 10(k). Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

STATEMENT OF THE CASE

This case involves picketing by the Plasterers Union ("Plasterers"),[2] respondent here, against two different employers, petitioners here, at two different construction sites in order to obtain for their members work assigned by the employers to their own employees, who were members of the Tile Setters Union ("Tile Setters").[3] In both instances, the employers were currently recognizing the Tile Setters as the collective bargaining representative of their employees and had for several years entered into collective bargaining agreements with that union (App. D, p. 89; A. 30, 57, 61, 438).[4] Neither employer had a collective bargaining agreement with the Plasterers (App. D, p. 89).

A. The Dispute Over Petitioner Texas State's Assignment

In 1965, the University of Houston contracted with Southwestern Construction Company ("Southwestern") to construct an addition to the University's Anderson Library. Southwestern then subcontracted the tile and terrazzo work involved on this job to petitioner Texas State Tile and Terrazzo Company ("Texas State") (App. D, pp. 83-84; A. 47, 29-30, 38). This work consisted of the application of tile to the walls of the restrooms and to the stairwalls of the eight-story library building. The tile was applied directly to a second coat of Portland cement mortar after a thin scratch coat of cement had been applied to the metal lath by the Plasterers (App. D, p. 85; A. 31-32, 38-39, 49-50, 150-151).

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[2] Plasterers' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO.

[3] Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America.

[4] "A" refers to the portion of the record printed as an appendix to the briefs in the court below. This appendix was submitted to the Court along with the NLRB petition for a writ of certiorari in No. 1184, filed on December 30, 1970.

Texas State, pursuant to its collective bargaining agreement with the Tile Setters, assigned the application of the second coat and the tile to its employees who were represented by the Tile Setters (App. D, p. 84; A. 42, 47, 61, 429-430, 434, 438).

Representatives of the Plasterers protested to the Tile Setters that the application of the second coat was the Plasterers' work (App. D, p. 84; A. 49, 51-52, 54).[5] When the Tile Setters disagreed with this claim, the Plasterers then submitted the matter to the National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"), a body set up by the Building Trades Department of the AFL-CIO to settle jurisdictional disputes (App. D, p. 84; A. 54-55). Both the Plasterers and the Tile Setters were bound, as a result of their affiliation with International Unions who are constituents of the AFL-CIO Building Trades Department, to submit jurisdictional disputes to the Joint Board. Texas State was not a signatory to and was not bound in any way to the Joint Board, and neither were its bargaining representatives, the Tile Contractors Association of America or the local chapter of the Tile Contractors (App. D, p. 84; A. 48). Texas State informed the Joint Board of this fact, and stated that it desired to present the dispute to the NLRB (A. 409).

On November 10, 1966, the Joint Board, relying upon precedent of August 22, 1917, ruled that the work in dispute should be assigned to Plasterers (App. D, p. 84; A. 411-412). The Joint Board specifically limited its award solely to the particular project (A. 411-412).

After the Joint Board award, Plasterers sought to obtain the work in question, but Texas State and its employees refused to accede to their demands (App. C, pp.

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[5] The second coat is termed the "brown coat" by Plasterers, and is called either the "float coat" or "setting bed" by the Tile Setters (App. D, p. 85; A. 51-52).

72-73; App. D, p. 84; A. 55-56, 415). On January 24, 1967, Plasterers picketed at the project to protest Texas State's refusal to assign the work to them, and all crafts working on the job honored the picket line, thereby causing a complete work stoppage (App. C, pp. 72-73; A. 33, 34, 47, 439). On February 10, 1967, the United States District Court for the Southern District of Texas, upon the application of the NLRB Regional Director, enjoined the picketing pursuant to Section 10(l)[6] of the Act. (App. C, p. 72; A. 28-29).

B. The Dispute Over Petitioner Martini's Assignment

In 1967, Rainbo Baking Company of Houston, Texas, decided to remodel the panning room of its bakery. It contracted directly with petitioner Martini Tile and Terrazzo Company ("Martini") to install ceramic tile over a brick wall in the baking area of the bakery (App. D, p. 85; A. 57, 99, 107-110). The task involved required nailing metal lath over the brick, applying a coat of Portland cement mortar directly to the lath, and setting the tile onto the cement mortar (App. D, pp. 85-86; A. 57-59, 99, 109-110). Martini, pursuant to its collective bargaining agreement with the Tile Setters, assigned this work to its own employees who were represented by the Tile Setters (App. D, pp. 85-86; A. 57, 438, 429-430, 434).

Martini began working at the project site on March 15, 1967. On March 17, Plasterers picketed the site in order to force Martini to assign the work involving the application of the cement mortar to Plasterers rather than Tile Setters (App. C, p. 73; App. D, p. 88; A. 57-58, 439). During the picketing, other crafts refused to work, and Rainbo officials requested Martini to remove its employees from the premises (App. D, p. 85; A. 439, 59-60, 98-99). Martini complied with the request and

[6] 29 U.S.C. 160(l).

the picketing stopped (App. D, p. 85; A. 59-60, 98-99). Martini subsequently returned to the project and completed the job (App. D, p. 85; A. 57-58).

Although both the Plasterers and the Tile Setters were subject to the Joint Board procedures, the Plasterers did not submit the dispute to the settlement procedures of that body. Martini was not stipulated to or bound by the Joint Board procedures on its own or through any of the associations to which it belonged (App. D, p. 86; A. 57, 128).

C. The Proceedings Before the NLRB

On January 30, 1967, and February 7, 1967, Southwestern and Martini filed charges against the Plasterers with the NLRB, contending that the Plasterers' picketing had violated Section 8(b)(4)(D) of the Act. After investigation of the charges disclosed reasonable cause to believe a violation had occurred, the NLRB, pursuant to Section 10(k) of the Act, issued a notice of hearing to determine the dispute out of which the alleged violation arose. At the hearing in April 1967, Texas State intervened in the consolidated proceedings and participated in the hearing with the charging parties and competing unions (App. C, pp. 68-70; App. D, p. 82). On August 22, 1967, the NLRB issued its Decision and Determination of Disputes.

1. *The Determination of the Jurisdictional Dispute*— In determining the dispute, the NLRB rejected the Plasterers' contention that it had no jurisdiction to determine the dispute. The Plasterers argued that Section 10(k) divested the NLRB of jurisdiction over jurisdictional disputes where "the parties to such dispute" had agreed upon a method for voluntary settlement, and that "the parties" here had agreed upon a method for voluntary settlement since both unions were bound to submit the dispute to the Joint Board. The NLRB found this con-

tention to be without merit because it had consistently held that "the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute" before the NLRB is divested of jurisdiction under Section 10(k), and that neither of the employers involved here had agreed to be subject to or bound by the Joint Board. Accordingly, the NLRB concluded that "the parties" to the dispute had not agreed upon a method for the adjustment of the dispute, and therefore, that the NLRB had jurisdiction under Section 10(k) (App. D, p. 88 n. 3).

On the merits of the dispute, the NLRB weighed all the relevant factors, including the award of the Joint Board, and concluded that at both projects employees represented by the Tile Setters, rather than those represented by Plasterers, were entitled to perform the work of applying the coat of Portland cement mortar upon which tile was to be installed (App. D, pp. 89-94).[7] Accordingly, the NLRB determined that the Plasterers were not entitled to picket or otherwise coerce the employers to assign the work in dispute to plasterers. The NLRB directed the Plasterers to notify the Regional Director of the NLRB within ten days as to whether it would comply with its determination (App. D, pp. 93-94).

2. *The Unfair Labor Practice Proceeding*—The Plasterers declined to comply with the NLRB Decision and Determination of Disputes, and, pursuant to its Rules and Regulations, the NLRB General Counsel issued a complaint upon the 8(b)(4)(D) charges (App. C, pp.

[7] The factors considered by the NLRB included the applicable collective bargaining agreements, the relative skills of the various employee groups, the efficiency of the operation under the respective employee groups, the agreements between the Plasterers and Tile Setters, the industry practice, the employer and area practice, and the Joint Board award (App. D, pp. 89-93). The NLRB did not attach controlling weight to the Joint Board award in "view of all the circumstances, including its ambiguous nature, and upon the entire record." (App. D, p. 92).

69-70). The parties waived a hearing on the complaint and submitted the case directly to the NLRB upon a stipulation and the record in the 10(k) proceeding (App. C, p. 70; A. 438-443).

Upon the entire record, the NLRB found that the Plasterers had violated Section 8(b)(4)(D) of the Act by picketing the Anderson Library and Rainbo Bakery sites for the objects of forcing Texas State and Martini to assign the disputed work to employees represented by Plasterers rather than employees represented by Tile Setters. The NLRB again rejected the Plasterers' contention that Section 10(k) precluded the NLRB from determining the dispute, reiterating its

> consistent interpretation of Section 10(k) that the employer controlling the work assignment as well as the rival unions involved comprise the "parties to such dispute", and all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that Section [App. C, p. 74]

The NLRB issued its usual order, requiring the Plasterers to cease and desist from the unfair labor practices found and to post the appropriate notices (App. C, pp. 77-80).

D. The Decision of the Court of Appeals

The court of appeals (Judges Leventhal and McGowan, with Judge MacKinnon dissenting) set aside and denied enforcement of the NLRB order (App. A, pp. 21-63). In the court's view "the Board erred in claiming authority under § 10(k) of the Act to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes" (App. A, p. 32) According to the court, Section 10(k) requires the NLRB to abstain from determining jurisdictional disputes whenever "the par-

ties to such dispute" have agreed on a method for the adjustment of such dispute, and that the proper construction of that provision should be that it "is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question" (App. A, p. 33). Since all the unions involved were bound to the adjustment procedure of the Joint Board, the court held that the "parties" to the dispute had agreed on a method for the adjustment of the dispute and that the NLRB could not properly proceed under Section 10(k) (App. A, pp. 23-24, 48-49).

In the dissenting opinion, Judge MacKinnon disagreed with the conclusion that the employer was not one of "the parties to such dispute." Relying upon *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964), he pointed out that under Section 8(b)(4)(D), and therefore 10(k), there is no "dispute" within the contemplation of the Act until one of the unions has made the employer a party to the dispute by striking him or engaging in other coercive action as a result of the employer's assignment of work (App. A, pp. 58-60). Finding no validity to the court's assertion of support for its position in the legislative history and case law, Judge MacKinnon found the "majority opinion . . . to be an unreasonable interpretation of the Act" (App. A, p. 62).

REASONS FOR GRANTING WRIT

The decision of the court of appeals rejects the consistent interpretation which the NLRB has given Section 10(k) since its enactment more than 23 years ago and which has been accepted by all the courts of appeals which have adverted to it. The decision below, if allowed to stand, will undoubtedly have an unsettling effect on the NLRB's administration of this and related provisions of the Act; and in particular will have a disruptive impact

on a major phase of the economy, the building and construction industry, and the NLRB's efforts to stabilize labor relations and curtail work stoppages in that industry. The issue of the proper construction of Section 10(k) is therefore of manifest importance in the administration of the Act and the maintenance of industrial peace. In view of these interests, the potential disruptive effect of the decision after 23 years of consistent interpretation by all administrative, judicial and industry bodies, and the extraneous litigation which the decision below has already engendered,[8] the issue is appropriate for immediate review.

1. Section 10(k) was added to the Act, along with companion Section 8(b)(4)(D), by the Taft-Hartley Amendments of 1947. Section 8(b)(4)(D) makes it an unfair labor practice for a union to picket or otherwise coerce an employer for an object of forcing the employer to assign work to a particular group of employees rather than to another. Whenever a Section 8(b)(4)(D) charge is filed, however, Section 10(k) *directs* the NLRB first to "hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."

In the first cases brought under these provisions, the NLRB held that Section 10(k) must be read together with Section 8(b)(4)(D) for a proper interpretation of its meaning.[9] In interpreting the abstention provision

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[8] See p. 20, *infra*.

[9] *Lodge 68 of the Int'l Ass'n of Machinists (Moore Drydock Co.)*, 81 NLRB 1108 (1949); *Int'l Longshoremen's Union, Local No. 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949). In both of these cases, the NLRB rejected contentions that Section 10(k) was applicable only where the employer was a neutral victim to conflicting union claims. In *Juneau Spruce*, it held (82 NLRB at 656): "[I]n the absence of language specifically limiting the application of Section 10(k) to certain situations *only*, or even persuasive

of Section 10(k) in this light, the NLRB has consistently construed the phrase "the parties to such dispute" as referring to the parties embroiled in the dispute resulting in the filing of the charge under Section 8(b)(4)(D), which parties includes the competing unions as well as the employer whose work assignment was the subject of the economic coercion.

Accordingly, the NLRB has consistently held, as it did in the instant case (App. D, p. 88), that it is divested of jurisdiction under the abstention provision of Section 10(k) only where the employer involved and the competing unions have jointly agreed upon a voluntary method of adjustment.[10] The NLRB's twenty-year construction of Section 10(k) in this regard had, prior to the instant case, never been challenged by any court of appeals, and indeed, had been favorably relied upon by those courts reviewing determinations in jurisdictional dispute cases. See *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 326 F.2d 213, 216 (3rd Cir. 1964); *Local 450, Int'l Union of Operating Engineers* v. *Elliott*, 256 F.2d 630, 635-636 (5th Cir. 1958); *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690 (D.C. Cir. 1966); *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 410 F.2d 5, 9 (3rd Cir. 1969) (citing the NLRB decision in the instant case for the proposition that the NLRB need hold a 10(k) hearing only where all parties are not bound to a method for voluntary adjustment), *cert. granted on other grounds*, 397 U.S. 905; *New Orleans Typographical Union No. 17* v. *National Labor Relations Board*, 368 F.2d 755, 763 (5th Cir. 1966).

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legislative history in support of such restricted application, the Board is obliged to give effect to that Section which its language requires."

[10] See, *e.g.*, *Int'l Union of Operating Engineers, Local 66 (Frank P. Badolato & Son)*, 135 NLRB 1392, 1395-1396 (1962), and cases cited at note 1 of the dissenting opinion in the decision below (App. A, p. 51).

2. The NLRB's consistent interpretation of the abstention provision of Section 10(k)—*i.e.*, that the coerced employer as well as the competing unions are "parties" to the dispute and must jointly agree on a method of settlement before the NLRB is divested of jurisdiction—is plainly dictated by the statutory language. The "parties to such dispute", as the phrase reads in 10(k), refers by its terms to "the dispute out of which" the 8(b)(4)(D) charge was filed. But as this Court noted in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964), no charge under 8(b)(4)(D) is appropriate until a union strikes or takes other coercive action against the employer to force him to assign particular work to employees in its union. Thus, Section 8(b)(4)(D), and therefore Section 10(k), are not operative until one of the unions has made the employer a party to the dispute by coercing him to change his assignment in accordance with the union's wishes. Accordingly, the employer, by the Act's terms, is necessarily a party to the dispute when the 8(b)(4)(D) charge is filed,[11] and therefore is one of the "parties to such dispute" for the purposes of the abstention provision of Section 10(k).

The court below failed to comprehend the statute's plain requirement in this regard. This failure, and the court's clear error in relying upon other grounds to support its view, as shown below, disclose the plain error of the decision below.

a. The fundamental error by the court below was its assumption that the employer was solely a neutral whose interests would be "fully served by any binding settlement between the disputing employee groups" without his participation (App. A, pp. 37-38). The employer in most jurisdictional disputes, particularly in the con-

[11] The latest NLRB Annual Report shows that an employer was the *charging party* in 445 of 478 charges filed under Section 8(b)(4)(D) in the course of the fiscal year. 33 NLRB Ann. Rep. 201 (1968).

struction industry, is vitally concerned that the work be performed by a particular group of employees because of reasons of economy, efficiency, ability, or the like. Indeed, it is often a matter of economic life-and-death for a contractor to have a particular group of employees perform the work rather than another.[12] This is so because the assignment of work to employees represented by another union may result in different terms and conditions of employment, replacement of the contractor's employees with outsiders, or even the loss of the contract by the employer. For example, in the instant case both employers had collective bargaining agreements with the Tile Setters covering the work in dispute, and neither had a contract with the Plasterers; both contractors assigned the work to their own employees represented by the Tile Setters pursuant to their contracts. An award of the work to Plasterers would require the contractors to hire a new complement of employees represented by Plasterers or else give up their subcontract.

In the construction industry, the employer's vital economic interest in the outcome of the jurisdictional dispute is further shown by the relationships involved. As Professor Dunlop, the first Chairman of the National Joint Board has stated:

> The fact that some unions work exclusively, as a matter of policy or custom, for particular contractors tends to convert competition among contractors also into jurisdictional disputes between unions. If a contractor is to hire such a craft he must also hire a sub-contractor. More accurately, the dispute is between a contractor and a union on one side against another contractor and union on the other side.[13]

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[12] Petitioner Martini testified at the hearing that assignment of the work in dispute here to Plasterers rather than Tile Setters would deprive it of 30 percent of its annual business (A. 129).

[13] J. Dunlop, *Jurisdictional Disputes*, New York Univ., Second Annual Conf. on Labor, 486.

For these reasons it is well recognized in the contruction industry that, as one union attorney has written, "an employer is not necessarily a neutral party unconcerned with which group performs the work . . . ." [14]

Moreover, the inclusion of employer groups into the National Joint Board establishes the belief of the union members thereto that the employer has a vital interest and concern in the determination of jurisdictional disputes.[15] As Professor Dunlop has written in this regard: "The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues and both have a vital contribution to make to their orderly settlement." [16]

In view of this recognition of the employer's potentially vital interest in the outcome of these disputes, the court below plainly erred in concluding the employer's interests were fully served without his participation in the settlement.[17]

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[14] O'Donoghue, *Jurisdictional Disputes in the Construction Industry*, 52 Geo. L. J. 314, 320-321 (1964).

[15] See n. 9, pp. 14-15, of NLRB petition in No. 1184, for the National Joint Board agreement.

[16] J. Dunlop, *Jurisdictional Problems in Construction Industry*, 40 LRRM 18, 19 (1957).

[17] The statute itself evidences Congress' recognition that jurisdictional disputes occur outside the framework of a neutral employer caught between warring unions. Congress changed Section 8(b)(4)(D) in Conference to expand the scope of that section to protect work assignments to employees *not represented by a labor organization* as well as assignments to organized employees. Thus, Congress recognized that a jurisdictional dispute could arise when an employer preferred for legitimate reasons to assign work to his own unrepresented employees, and that he was entitled to the protection of 8(b)(4)(D) and 10(k) when he did so. Compare Section 8(b)(4)(D) in H.R. 3020, as passed by the Senate, 80th Cong. 1st Sess., pp. 81-83 (1 Leg. Hist. 239-241) (1947). with that section as enacted. See explanation of Senator Taft, 93 Cong. Rec. 7002 (Daily ed., June 12, 1947), in II Leg. Hist. 1624 (1947).

b. The court below plainly erred in urging that the legislative history provided support for its conclusion. The committee reports and floor debates disclose absolutely no discussion of what Congress meant by the phrase "the parties to such dispute" in Section 10(k).

There was no provision comparable to Section 10(k) in the House bill, which merely outlawed "jurisdictional strikes" against the employer. Section 10(k) first appeared in the Senate bill, but there was no discussion of the intended scope of the term "parties" because the concern of Congress was over a clause authorizing the NLRB to appoint an arbitrator to hear and determine jurisdictional disputes. In Conference, the "arbitrator" provision was dropped and Section 10(k) took its present form, but without any discussion of the reach of the term "parties." [18]

The court's conclusion is not supported by its reliance upon the expressed hope of Senator Morse in the floor debates that 10(k) would encourage unions to set up machinery for the settlement of such controversies within their own ranks (App. A, pp. 39-40). It is clear that Senator Morse spoke of the settlement of disputes by unions anterior to a strike and thus before the Act's provisions became operative: in the speech quoted by the court (App. A, p. 40), Senator Morse specifically referred to union machinery "settling such disputes *short of economic action*" (emphasis added). Thus, Senator Morse spoke of the hope that unions could in most cases eliminate the dispute among themselves *prior* to embroiling the employer into the dispute *via* coercive economic action; his comments do not indicate that once the coercive action is instituted the unions could under 10(k) settle the dispute solely among themselves without the employer's participation. The "incentive" to unions to settle the dis-

[18] See *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union, Local 1212, IBEW (CBS)*, 364 U.S. 573, 581-582 (1961), for a detailed discussion of this history.

putes among themselves in order to avoid the Act's machinery is therefore equally present whether or not the employer is considered a party for purposes of Section 10(k).

Accordingly, the legislative history relied upon by the court below does not support its conclusion. As Judge MacKinnon remarked in his dissent (App. A, p. 57): "The truth of the matter is that the legislative history of section 10(k) does not afford any substantial assistance to its interpretation and the weakness of the majority opinion is demonstrated by its assertion that it does."

c. Nor is the court below correct in finding "persuasive evidence" for its interpretation from the "fact that the employer is not bound by a 10(k) determination" (App. A, p. 33). The employer is bound to the 10(k) award in a very meaningful sense, for if he ignores the award he is subject to the full force of economic pressure by the union who was awarded the work and no 8(b)(4)(D) charge will lie to proscribe that pressure. See *Local 502, Int'l Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963); *Hoisting and Portable Engineers Local 701*, NLRB Case No. 36-CD-55.

Moreover, the court's argument in this regard fails to recognize that the scheme of the Act in general, and the 8(b)(4) provisions in particular, is non-compulsive. The Section 8(b)(4) provisions were designed to limit picketing in certain undesirable circumstances; they were not designed to *compel* employers to accede to the picketing union's objects where the picketing was found to be legitimate. For example, where picketing under Section 8(b)(4)(B) is found to be primary rather than secondary, and therefore lawful, the picketed employer is under no statutory compulsion; rather, he merely remains subject to that legitimate picketing as long as the union seeks to use that sanction as the means to attain

its object. The same non-compulsion is applicable to the jurisdictional dispute provisions as well. Accordingly, the failure of the Act to "bind" the employer to the 10(k) award reflects only the non-compulsive scheme of the Act rather than Congress' intent that the employer to a jurisdictional dispute is a disinterested neutral.

d. Finally, the court misplaces reliance upon the National Joint Board as a joint body of employers and unions which the court found makes "realistic provision for meaningful attention to the interest of the employer and to questions of efficiency. * * * * It is a board that takes into account factors of economy and efficiency of operation." (App. A, pp. 48-49, n. 27). To the contrary the Joint Board's decisions, as in the instant case (A. 411-412), subordinate such factors to considerations of precedent and practice, and as a result employers have been unwilling to bind themselves to its jurisdiction.[19] Because of the Joint Board's failure to recognize such management considerations, the Associated General Contractors (representing members who perform about 80 percent of the construction in the construction industry) and four national specialty contractor associations, after lengthy negotiations to secure reforms in the Joint Board Plan proved unsuccessful, withdrew from the Joint Board on September 30, 1969, leaving only a few specialty contractor associations as the employer signatories to the current Joint Board Plan.[20]

Under the court's ruling, the Joint Board will have exclusive control over the determination of jurisdictional disputes involving these very contractors who withdrew from that body because of their dissatisfaction with its

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[19] See Note, 77 Yale L. J. 1191, 1200-1201 n. 52, 1203-1204 (1968); K. Strand, *Jurisdictional Disputes in Construction* 45, 93, (1961).

[20] Construction Labor Report, No. 732, Oct. 1, 1969 (BNA). Petitioner Tile Contractors Association and its members withdrew in 1959.

consideration of their necessities. It is indeed unlikely that in the future the Joint Board will respond more favorably to an employer's considerations should the decision here, that the employer has no part in the determination of the dispute, be allowed to stand.

3. The issue presented is a recurring and important issue in the NLRB's administration of the Act, and one of vital consequence particularly to employers in the construction industry. The decision of the court below, unless it is overturned, will cause immediate disruption of established practices and relationships in the construction industry and will drastically hamper the NLRB's efforts to curtail work stoppages in that industry.

The most recent NLRB Annual Report shows that 478 charges of 8(b)(4)(D) violations were filed in the fiscal year, and 306 of them (64 percent) involved the construction industry.[21] The decision below should prompt even more charges as unions who have Joint Board precedent in their favor stand to use economic pressure without proscription should the Joint Board follow the precedent and rule in their favor.

Further, contrary to the opinion of the court below (App. A, pp. 34-36), the likelihood of the NLRB obtaining a 10(l) injunction is severely hampered by the instant decision. The issue before the district court on a 10(l) injunction is whether there is reasonable cause to believe Section 8(b)(4)(D) has been violated. *Penello* v. *Local Union No. 59, Sheet Metal Wkrs. Int'l Ass'n*, 195 F. Supp, 458 (D. Del. 1961). In a case such as here, where the Joint Board award preceded the picketing (App. D, pp. 84-85), a district court, accepting the reasoning of the court below, would be hard pressed to find reasonable cause of an 8(b)(4)(D) violation since the "parties" method of voluntary adjustment had already awarded the work in question to the picketing union.

[21] 33 NLRB Ann. Rep. 208-209 (1968).

Even in cases where the picketing precedes the Joint Board award, a court adhering to the decision below should indeed be hesitant to find reasonable cause where the picketing union could show Joint Board precedent in its favor. Accordingly, the decision below will undoubtedly hamper the NLRB's efforts to curtail work stoppages and maintain industrial peace in the construction industry, where nearly all unions are subject to the Joint Board.

Finally, the decision assuredly will disrupt existing bargaining relationships and engender more litigation. Thus, the Joint Board award in the instant case awarded the work in question to the Plasterers, despite the fact that the employer had a collective bargaining agreement with the Tile Setters covering the same work and had no agreement with Plasterers (*supra*, pp. 4, 5). Since the Tile Setters ignored the award and performed the work, but are bound with the Plasterers to the Joint Board, the Tile Setters are potentially subject to a suit for damages by the Plasterers under Section 301 for violations of their stipulation to the Joint Board. Five such lawsuits, the first of their kind, have already been filed in the few months since the court's opinion issued below.[22]

The decision of the court below therefore portends seriously to impede the NLRB's effective administration

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[22] *Plumbers' Local 157* v. *Laborers' Local 204 and L & K Contracting Co.*, (complaint filed Oct. 21, 1970), C.A. No. 70-C-109 (D.C.S.D.Ind.); *Plumbers' Local 162* v. *Laborers' Int'l Union and Laborers Local 1410 and B. G. Danis, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3980 (D.C.S.D.Ohio); *Plumbers' Local 162* v. *Laborers' Int'l Union and Laborers' Local 1410 and Ohio Excavators, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3979 (D.C. S.D.Ohio); *Plumbers' Local 129* v. *Laborers' Local 210 and Edward J. DeBartolo Corp.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-580 (D.C.W.D.N.Y.); *Plumbers' Local 129* v. *Laborers Local 91 and Albert Elia Bldg. Co.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-581 (D.C.W.D.N.Y.). A similar action was filed solely against a contractor to protest his work assignment to laborers in *Operating Eng'rs. Local 150* v. *Wild Masonry Co.*, (complaint filed Nov. 23, 1970), C.A. No. 70-C-2944 (D.C.N.D.Ill.).

of the Act and to disrupt labor relations in the construction industry. A prompt resolution of the issue by this Court is accordingly required.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 1971